Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

October Term, A.D. 1946.

330 I.A. 129

General No. 9507

Agenda No. 2

HARRY L. BARKER, Plaintiff-Appellant,	)	
-vs-	)	Appeal from Circuit Court Macoupin County.
JOHN MONTS, Defendant-Appellee.	)	

DADY, P.J.

This is an action to recover $376.38 damages to the automobile of plaintiff-appellant, resulting from a collision with the automobile of defendant-appellee.

Judgment was entered in the Circuit Court for the defendant, based on the verdict of a jury which found the defendant not guilty.

The defendant was a minor aged eighteen years at the time of the

Court of Appeals,
Appellate Court,
Third District.

October Term, A.D. 1940.

October 2, 1940 Appeal No. 2

MARY L. FORD,
Plaintiff-appellee,

-vs-

JOHN WEST,
Defendant-appellee.

Appeal from
Circuit Court
Macoupin County.

Mr. J.J.

This is an action to recover $273.50 damages to the automobile of plaintiff-appellee, resulting from a collision with the automobile of defendant-appellee.

Judgment was entered in the Circuit Court for the defendant, based on the verdict of a jury which found the defendant not guilty.

The defendant was a minor aged eighteen years at the time of the

trial, and a guardian ad litem was appointed to represent him.

The defendant has filed no brief or argument in this court. On account of his being a minor we are deciding the case upon its merits.

The only contentions of the plaintiff are that the trial court should have allowed the plaintiff's motion for a judgment notwithstanding the verdict, or that, in the alternative, the judgment of the trial court should be reversed and the cause remanded for a new trial because the plaintiff contends the verdict is against the manifest weight of the evidence.

The collision occured somewhere in the north half of the intersection of Jefferson and Eleventh Streets, which was in the business district of the City of Springfield. Jefferson Street runs east and west. Eleventh Street runs north and south. The intersection was paved with brick and was about 60 feet in width. There were no stop signs. There was a "boulevard" light on the northwest corner of the intersection.

The collision occured on November 19, 1944, about nine P.M. The plaintiff was driving westerly. The defendant had been driving easterly, and somewhere in the intersection the defendant turned left and into the north half of Jefferson Street, intending to proceed north on Eleventh Street, which resulted in the collision. No claim is made that either car was going at an unreasonable rate of speed.

The plaintiff had a friend named Oberman riding with him, and the defendant had a friend named Gardner riding with him. These were the only witnesses.

trial, and a question so likely was requested to represent the.

The defendant has filed no brief or argument in this court. On account of his being a minor we are deciding the case upon its merits.

The only contention of the plaintiff in error that the trial court should have sustained the plaintiff's motion for a judgment notwithstanding the verdict, or that, in the alternative, the judgment of the trial court should be reversed and the cause remanded for a new trial because the plaintiff contends the verdict is against the manifest weight of the evidence.

The collision occurred somewhere in the north half of the intersection of Jefferson and Eleventh streets, which are in the business district of the City of Springfield. Jefferson Street runs north and south. Eleventh Street runs north and south. The intersection was paved with brick and was about 60 feet in width. There were no stop signs. There was a "boulevard" light on the northeast corner of the intersection.

The collision occurred on November 20, 1927, about nine [illegible]. The plaintiff was driving westerly. The defendant had been driving southerly, and somewhere in the intersection the defendant turned left and into the north half of Jefferson Street, intending to proceed north on Eleventh Street, which resulted in the collision. No claim is made that either car was going at an unreasonable rate of speed.

The plaintiff had a friend named Cherman riding with him, and the defendant had a friend named Barker riding with him. These were the only witnesses.

All of the witnesses testified that prior to the accident it had been snowing a little. The plaintiff testified that it was not snowing at the time of the accident, that there was no snow on the pavement, but that there was a mist in the air. Oberman testified that it was kind of hazy and the pavement was dry, not really wet. The defendant testified it was snowing pretty heavy and that there was snow on the pavement. Gardner testified it was snowing a light wet snow.

All witnesses testified that the dim bright headlights on the plaintiff's car were lighted. As to the headlights on the defendant's car, the plaintiff and Oberman testified that such lights were not lighted, while the defendant and Gardner both testified that the defendant's dim driving headlights were lighted.

All witnesses testified that the left front end and side of the plaintiff's car and the right front end and side of the defendant's car were damaged.

There was a sharp conflict in the testimony as to whether the collision occured in the northwest or in the northeast quarter of the intersection. The plaintiff and Oberman testified that plaintiff's car was struck by defendant's car in the northwest quarter of the intersection, and that they first saw the defendant's car 6 or 8 feet distant coming at a sharp angle from the southwest at a time when the plaintiff's car was well into the northwest quarter of the intersection. The defendant and Gardner testified that the collision occured in the northeast quarter of the intersection, and that defendant did not make his left turn until he had reached the east side of the center of

All of the witnesses testified that prior to the accident it had been snowing a little. The plaintiff testified that it was not snowing at the time of the accident, that there was no snow on the pavement, but that there was a mist in the air. Oberman testified that it was kind of hazy and the pavement was dry, not really wet. The defendant testified it was snowing pretty heavy and that there was snow on the pavement. Gardner testified it was snowing a little wet snow.

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Eleventh Street. The defendant testified he first saw the plaintiff's car when it was about 10 feet distant. Gardner testified he first saw plaintiff's car when it was 10 or 15 feet distant.

As to whether the defendant made any signal before making a left turn, the only testimony was that of the defendant who testified that as he came to the intersection he signaled back and left to turn and looked for approaching cars and started to turn and after he had turned and gone 4 or 5 feet he first saw the plaintiff's car, and he then tried to stop but could not do so, and that defendant's car was then struck by plaintiff's car.

The question of whether the collision took place in the northwest or the northeast quarter of the intersection, and the question of whether the defendant was telling the truth as to when and where he so signaled, were, of course, questions of fact for the jury to pass upon.

After a careful consideration of all the evidence, it is our opinion that the trial court properly denied the motion of the plaintiff for a judgment notwithstanding the verdict, and it is our opinion that we cannot properly say that the verdict was against the manifest weight of the evidence.

Therefore the judgment of the trial court is affirmed.

Affirmed.

Abstract

STATE OF ILLINOIS

APPELLATE COURT

October Term, A. D. 1946

General No. 9512 Agenda No. 5

390 I.A. 129

Wesley Miller, Plaintiff-Appellee,	)	Appeal from Circuit Court Christian County.
vs.	)	
Baltimore & Ohio Southwestern Railroad Company, Defendant-Appellant.	)	

Dady, P. J.

A two-door automobile coupe, while being driven by plaintiff - appellee on a public highway and across a railroad crossing of the defendant-appellant, was struck by a motor-driven passenger railroad car of the defendant. Plaintiff brought this suit to recover for injuries to his person and automobile. Judgment for $2,990.00 was entered for the plaintiff on a verdict of a jury.

STATE OF ILLINOIS

APPELLATE COURT

October Term, A. D. 1946

General No. 5014 | Appeal No. 3

3 Ill. App. 2d 129

Hadley Miller,

Plaintiff-Appellee,

vs.

Baltimore & Ohio Southwestern Railroad Company,
Defendant-Appellant.

Appeal from
Circuit Court
Christian County.

Judge P. J.

A two-door automobile coupe, while being driven by plaintiff - appellee on a public highway and across a railroad crossing of the defendant-appellant, was struck by a motor-driven passenger railroad car of the defendant. Plaintiff brought this suit to recover for injuries to his person and automobile. Judgment for $8,500.00 was entered for the plaintiff on a verdict of a jury.

No complaint is made that the amount of damages allowed was excessive.

The trial court, at the request of defendant, instructed the jury that there was no evidence that the speed of the train was the proximate cause of the injuries, no evidence that defendant failed to sound proper warning of the approach of the train, and no evidence that the crossing was improperly constructed or maintained.

The only charge of negligence on which the case was allowed to go to the jury was that the defendant negligently failed to remove brush, shrubs and vegetation from its right of way as required by statute so that the view of the plaintiff was so obstructed that he was injured while in the exercise of due care.

The defendant contends that the trial court erred in not directing a verdict for the defendant at the conclusion of all the evidence, and erred in not entering judgment in favor of the defendant notwithstanding the verdict, because, as defendant contends, the plaintiff did not prove he was in the exercise of reasonable care, and did not prove any actionable negligence on the part of the defendant which was the proximate cause of the collision.

The collision occured on December 15, 1943, at about 9:30 A.M. The sun was shining brightly. The weather was very cold, - about

be complaint in such that the conduct of defendant allowed and encouraged.

The trial court, at the request of defendant, instructed the jury that there was no evidence from the cause of the injury was the proximate cause of the injuries, no evidence that defendant failed to sound proper warning of the approach. If the trial, and to evidence that the proximate was improperly overcharged or misleading.

The only chance of negligence on which the case was allowed to go to the jury was that the defendant negligently failed to remove broken, abuse and revelation from its right of way so resulting in statute so that the view of the plaintiff was so obstructed that he was injured while in the exercise of the care.

The defendant's evidence that the trial court erred in not directing a verdict for the defendant at the conclusion of all the evidence, and erred in not overruling defendant's motion for a new trial. The motion, however, in different contexts, the plaintiff's injury was in the exercise of reasonable care, and did not prove any actionable negligence on the part of the defendant which was the proximate cause of the collision.

The collision occurred on December 3, 1960, at about 1:30 A.M. the car was moving eastwardly. The weather was very cold, - above

zero.

State Route 29 was paved with concrete and ran in a northwesterly direction parallel to the right of way of defendant. Route 29 was intersected by a county oiled road which crossed the railroad tracks at an angle of about 35 degrees, slightly towards the southwest. The distance between the pavement of Route 29 and the railroad crossing was about 48 feet. The railroad tracks were about a foot and a half lower than the pavement on Route 29, and from such pavement to the railroad tracks there was a gradual slope downward. The travelled portion of the oiled road was about 17 feet wide and was very slick from ice, frost and snow. After driving north on Route 29 the plaintiff turned to his left onto the oiled road and was trying to drive across the railroad tracks when his automobile was struck by the defendant's motor railroad car which was then being driven in a northerly direction.

As to the condition of the strip of land at the southeast corner of the railroad crossing, between the railroad tracks and Route 29, and as to the then condition of the vegetation on such strip of land, the plaintiff, his son Alfred Miller, and Carl Durham testified for the plaintiff, while three witnesses testified for the defendant.

The plaintiff testified that "right at the crossing there was about a three foot cut and further south there's over six feet"; that there were weeds and brush 5 or 6 feet high on the embankment

[illegible]

State Route 32 was paved with concrete and ran in a northwesterly direction parallel to the right of way of defendant. Route 23 was intersected by a county dirt road which crossed the railroad tracks at an angle of about 32 degrees, slightly towards the southwest. The distance between the pavement of Route 32 and the railroad crossing was about 40 feet. The railroad tracks were about 4 feet and 4 inches lower than the pavement on Route 32. The tracks were covered by the railroad tracks upon a gradual slope downward. The travelled portion of the dirt road was about 17 feet wide and was very dirt from rain, frost and snow. After crossing north on Route 32 the plaintiff turned to his left onto the dirt road and was trying to drive across the railroad tracks when his automobile was struck by the defendant's motor driven car which was being driven in a northerly direction.

As to the condition of the right of land at the southeast corner of the railroad crossing, between the railroad tracks and Route 32, one is to the jury condition of the vegetation on such right of land, the plaintiff, in the dirt filled ditch, and that there was evidence for the plaintiff, while there was witnesses testified for the defendant.

The plaintiff testified that "right at the crossing there was about a ditch that was not further south than 3 or 4 feet; that there was weeds and brush 3 or 4 feet high on the southeast

at such southeast corner and about 50 feet from the crossing, which weeds were growing to the south and southeast as far as he could see; that such weeds were covered with heavy frost and snow; that when he had crossed the same crossing earlier on the same morning, and while going in the same direction, he had to get up on the railroad crossing before he could see down the track.

Alfred Miller testified that he had measured the embankment at the southeast corner of the crossing and it was between 3 and 4 feet above the railroad tracks; that on such embankment beginning 8 or 10 feet from the oiled road, there were weeds and brush; that right after the accident he walked in amongst such weeds and they were from 4 and a half to 5 feet high and were covered with heavy frost, that in trying to look over the top of the weeds he could only see the sky above the weeds and could not see the railroad tracks at all.

Carl Durham, who lived about an eighth of a mile from the crossing, heard the crash of the collision and immediately went to the crossing. He testified that to the southeast of the crossing there was a three or four foot embankment which started about 6 or 8 feet from the oiled road and continued southerly for about an eighth of a mile, that on such embankment the weeds were 4 or 5 feet high, that one could not see through or beyond such weeds, and that he noticed that morning "you had to be about 3 feet from the tracks in order to see down them."

Fred Taylor, who was the engineer on the motor car of the defendant, testified that he saw the plaintiff turn off the hard road and drive right onto the track and stopped, that there was no embankment "right

at the crossing," and no weeds within 300 feet of the crossing.

Glenn Barding, a track foreman of defendant, testified that the embankment started about 15 feet from the middle of the crossing at a point where it was about a foot or a foot and a half higher than the oiled road; that the "deepest" point of the embankment was 3 to 4 feet, and that such point was about one eighth of a mile from the crossing. He further testified that in the latter part of August or about the first part of September 1943, he had the weeds mowed southerly from the crossing for a distance of from 150 to 200 feet, and that in that distance there were no weeds along the embankment.

Ross, a civil engineer of defendant, testified that before the trial he took measurements with a level; that on the southerly side of the road there was a slight embankment the highest point of which was 12 feet south of the crossing and 17 feet east of the center of the railroad tracks, which point was 2 feet 8 inches above the rail. He did not testify as to weeds or other obstructions.

Plaintiff was aged 64 at the time of the accident. He lived in the vicinity, had crossed the crossing three or four times daily for several years, and was thoroughly familiar with the crossing.

On the first day of the trial he testified that he imagined the distance between Route 29 and the crossing was at least 100 feet; that as he turned off Route 29 and approached the crossing plenty of wind was blowing from the northwest; that an approaching truck was coming over the crossing; that plaintiff stopped just off the hard road, something like 10 feet from the hard road, and when he was about 40 feet from the crossing, and that when the truck came

at the crossing," not no weeds within 300 feet of the crossing.

Glenn Dunlap, a great farmer of Lafayette, testified that the embankment (behind which it was about 15 feet from the middle of the crossing, at a point where it was about a foot or a foot and a half higher than the other rail; that the "lowest" point of the embankment was 2 to 4 feet, and that such point was about one eighth of a mile from the crossing. He further testified that in the latter part of August of about the first part of September 1941, he had the weeds mowed southerly from the crossing for a distance of from 140 to 200 feet, and that in that distance there were no weeds along the embankment.

Dunn, a civil engineer of Lafayette, testified that before the 1941 he took measurements with a level; that on the northerly side of the road there was a slight embankment the highest point of which was 12 feet south of the crossing and 17 feet east of the center of the railroad tracks, which point was 6 feet 2 inches above the rail. He did not testify as to weeds or other obstructions.

Plaintiff was sued on as the fault of the engineer. He tried in the statutory, and received the crossing three or four times daily for several years, and was thoroughly familiar with the crossing.

On the first day of the trial he testified that he lengthened the distance between points M and the crossing was at least 100 feet; that as he turned off north on and approached the crossing clearly of what was coming from the northwest; that an approaching train was seeing over the crossing; that plaintiff stopped just off the main road, something like 10 feet from the last rail, and then he was about 40 feet from the crossing, and that when the train came

across the crossing he started to cross and did not stop any more and did not stop near the railroad; that he so stopped to let the truck get by and listened to ascertain if a train was approaching; that he looked and listened but did not see or hear a train at any time; that the back end of his car was then hit and he did not know anything until he found himself in the hospital.

On the second day of the trial the plaintiff testified that on the morning of the second day of the trial he went back to the scene of the accident and refreshed his memory by taking measurements, and that the place where he stopped to let the truck pass and to look and listen was about 3 feet from the tracks.

Other than the plaintiff the only eye witness to the accident was the engineer Taylor. Taylor testified that his motor car was about 14 feet in height; that he saw plaintiff's automobile before plaintiff turned off the hard road; that he "guessed" he saw "the car and the truck parked by the track a mile back from the crossing"; that the plaintiff just drove right onto the track and stopped on the track on the left hand rail as you go north, that plaintiff's car made only one stop and that was about 200 feet before we got to the crossing, and the truck was standing "there" at the time of the collision but moved away after the collision, and that the first and only stop that plaintiff's car made was on the tracks. He further testified that the railroad car was travelling about 40 miles an hour immediately before the accident.

[illegible] the occasion he started to cross and did not look any more and did not stop when the policeman; that he is observed to let his truck out of and listened to accordingly if a truck was approaching; that he looked and listened but did not see or hear a train at any time; that the back end of his car was also left and he was not running until he found himself in the hospital.

On the second day of the trial the plaintiff testified that on the morning of the second day of the trial he went back to the place of the accident and refreshed his memory to certain measurements, and that the place where he stopped to let the train pass was in he did listen the about 1 yard from the track.

After that the plaintiff the only witness to all witnesses was the engineer driver. Counsel insisted that a motor car was hidden at fast to nobody that he saw plaintiff's automobile before plaintiff turned off the road road; that he "observed" he saw this car and the truck pushed by the track a mile back from the crossing; that the plaintiff just drove right onto the tracks and stopped on the track on the left hand rail as you go north, back plaintiff's car was only one also and that he about 300 feet before he got to the crossing, and the truck was moving forward at the time of the collision and never came after the collision, and that the tires had only stop that plaintiff's car made was on the track. He further testified that the railroad car was travelling about 40 miles an hour immediately before the accident.

Taylor further testified that as he approached the crossing the regular crossing warnings, by way of a whistle and the ringing of a bell, were given. His testimony as to such crossing warnings was corroborated by the testimony of the son of the plaintiff and by the witness Durham who said they heard the whistle.

The truck driver did not testify and neither side accounted for his absence.

In passing on a motion for judgment notwithstanding the verdict the rules applicable on a motion for a directed verdict should be applied. The evidence must be considered in its aspect most favorable to the plaintiff, together with all reasonable inferences to be drawn therefrom, and the court is required to assume that the evidence favorable to the plaintiff is true. The evidence must not be weighed and all contradictory or explanatory circumstances must be rejected. The only inquiry is whether there is any evidence fairly tending to prove the plaintiff's complaint. If there is any evidence fairly tending to prove the complaint, the motion must be denied, even though the court is of the opinion that a verdict for the plaintiff, if given, must be set aside as against the preponderance of the evidence. (Synwolt v. Klank, 296 Ill. App. 79; Hunter v. Troup, 315 Ill. 293; Osborn v. Leuffgen, 312 Ill. App. 251.)

Applying such rules of law to the foregoing facts it is our opinion that, notwithstanding the inconsistences in the testimony of plaintiff, the evidence most favorable to the plaintiff fairly tended to prove the material allegations of the complaint, and that the trial

Taylor further testified that he had witnessed the unusual regular morning weakness, by way of a stroke on the starting of a bell, was liver. All testimony to be only corroborated by the testimony of the son of the plaintiff and by the witness Cochran who said they heard the whistle.

The train driver did not testify one neither did counsel for his absence.

In ruling on a motion for judgment notwithstanding the verdict the rule applicable to a motion for a directed verdict should be applied. The evidence must be considered in the light most favorable to the plaintiff, resolving all reasonable inferences in favor thereof, and the court is required to assume that the evidence favorable to the plaintiff is true. No evidence must be weighed and all contradictory or explanatory circumstances must be rejected. The only inquiry is whether there is any evidence tending to prove the plaintiff's complaint. If there is any evidence tending to prove the complaint, the motion must be denied, even though the court is of the opinion that a verdict for the plaintiff, if given, would be set aside as contrary to the preponderance of the evidence. (Cannon v. Elmo, 241 Ill. App. 75; Gaston v. Tracy, 215 Ill. App. 1; Greene v. Langlois, 215 Ill. App. 1.)

Applying said rule of law to the foregoing facts in the opinion that, notwithstanding the inconsistencies in the testimony of plaintiff, the evidence most favorable to the plaintiff fairly tended to prove the material allegations of the complaint, and that the evidence

court therefore did not err in denying the motion for a directed verdict or in denying the motion for a judgment for the defendant notwithstanding the verdict.

One of the errors assigned is that the verdict is contrary to the manifest weight of the evidence. As we read defendant's brief and argument such assignment of error is not therein argued or discussed and therefore need not be discussed in this opinion. However, we have carefully considered the evidende and are of the opinion that we cannot properly say that the verdict was against the manifest weight of the evidence.

Defendant's brief says that plaintiff "says he went up onto the track knowing that he could not see whether a train was coming. If we accept this as true it surely condemns his conduct as utterly disregardful of the danger." We do not feel that we can properly say that if the plaintiff stopped his car when his front bumper was within 3 feet of the nearest rail, and then tried to but could not see over the top of the weeds and down the tracks, and if he then listened but heard no approach of the train, and then immediately started to drive across the crossing, he was guilty of contributory negligence as a matter of law. (See Gills v. New York, Chicago & St. L.R.R. Co., 342 Ill. 455.)

Defendant says "opinions as to distance, etc., must give way to actual measurements, and where a plat drawn to a scale, such as defendant introduced here, is unrebutted it must take precedence over oral testimony."

The plat referred to shows no profile or measurement whatever as to the height of the embankment. The civil engineer Ross testified as to the height of only one point on the embankment, and the witness

court therefore did not err in denying the motion for a directed verdict or in denying the motion for a judgment for the defendant notwithstanding the verdict.

One of the errors assigned is that the verdict is contrary to the manifest weight of the evidence. As we read defendant's brief and argument this assignment of error is not therein argued or discussed and therefore need not be discussed in this opinion. However, we have carefully considered the evidence and are of the opinion that we cannot properly say that the verdict was erroneous for the manifest weight of the evidence.

Defendant's brief says that plaintiff had to stand up and turn around knowing that he could not see whether a train was coming. It is accept this as true it merely emphasizes his conduct as utterly disregarding of the danger. " To do not feel that we can properly say that if the plaintiff stopped his car when his front bumper was within 3 feet of the nearest rail, and then tried to but could not see over the top of the seats and down the tracks, and if he then listened but heard no approach of the train, and then immediately started to cross across the crossing, he was guilty of contributory negligence as a matter of law. (See Gillie v. Illinois & St. L.R.R. Co., 352 Ill. 484.)

Defendant cite locations as to distance, etc., such give rise to actual measurements, and when a plat drawn to a scale, such as defendant introduced here, is unchallenged it must take precedence over oral testimony."

The plat referred to shows no profile or measurement whatever as to the height of the embankment. The civil engineer does testified as to the height of only one point on the embankment, and the witness

Alfred Miller was not questioned as to how he took his measurements.

After Barding, the track foreman, had testified that the weeds along the right of way were cut in August or September of 1943, he was asked on cross examination if as a matter of fact he cut such weeds the next day after the accident. The trial court immediately sustained an objection to such question and directed the jury to pay no attention to the question. This is the only alleged improper conduct of plaintiff or his counsel complained of, and we do not consider such conduct was so prejudicial as to justify a reversal.

Over objection of defendant the plaintiff was permitted to testify that the train was due at Sharpsburg, less than a mile distant, at 8:30 A.M. The collision occured about 9:30 A.M. At the request of defendant, the court instructed the jury that the fact that the train was not running on scheduled time did not constitute negligence and should not be considered by the jury, and, as stated, instructed the jury that there was no evidence that the speed at which the train was travelling was the proximate cause of any injuries, and that the jury could not find the defendant guilty on account of the speed of the train. It is our opinion that the error, if any, in permitting this question to be answered was cured by the giving of such instructions.

The defendant contends that the court erred in permitting an attending physician to testify that plaintiff's condition was the result of the collision in question. The doctor had testified that he attended the plaintiff in the hospital and found the plaintiff had

Alfred Miller was not prejudiced or so low he took his measurements.

After Perkins, the trial lawyer, had testified that the crowd along the right of way were not in danger or jeopardy of life, he was asked to prove that Miller if at a spider of that he did not make the best day after the accident. The trial court immediately sustained an objection to such question and directed the jury to pay no attention to the question. This is the only alleged improper conduct of plaintiff's counsel complained of, and we do not consider such conduct was a prejudicial to plaintiff's rights.

Over objections of defendant the plaintiff was permitted to testify that the train was due at Bonneville, some one a mile distant, at 6:45 p.m. The objection overruled under rule. At the request of defendant, the court instructed the jury that the fact that the train was not running on schedule time did not constitute negligence and should not be considered by the jury, and, on request, instructed the jury that there was no evidence that the train on which the train was travelling was the proximate cause of the injury, and that the jury could not find the defendant guilty on account of the speed of the train. It is our opinion that the error, if any, in permitting the question to be answered was cured by the giving of such instruction.

The defendant contends that the court erred in permitting an attorney representing the plaintiff's association was the result of the collision in question. The lawyer had testified that he attended the plaintiff in the hospital and found the plaintiff had

a brain concussion and dislocated shoulder, and that he put the shoulder in place in the socket, but it would not remain in proper place because the bone cavity did not seem to be of the proper depth. The doctor then testified that at the time of the trial the plaintiff had a limited motion in his arm and shoulder. The doctor was then asked if from his examination and treatment of the plaintiff he could tell the jury what if anything caused such limited motion. Over objection the doctor answered, "the injury, naturally, would be the thing that would cause that." On cross examination the doctor said that one of the reasons for such disability was that the cavity was not of normal depth, and that such was a natural condition in the plaintiff. Considering the question and answers, we do not consider there was any error in overruling the objection (See Chicago Union Traction Co. v. Roberts, 229 Ill. 481; City of Chicago v. Didier, 227 Ill. 571.)

Defendant complains of an instruction in the language of the statute that every railroad operating within this State shall remove from its right of way at all grade crossings within the State, all brush, shrubbery and trees for a distance of not less than 500 feet from either direction from each grade crossing. Neither of the briefs cited the chapter, section or page of the statute where such statute may be found and we have had considerable difficulty in locating it. It will be found in Ch. 111-2/3, Par. 62, Sec. 58, p. 2624, Revised Statutes of 1945. We do not consider there was any error in the giving of such instruction - (See Deming v. City of Chicago, 321 Ill. 341, 345.) particularly in view of the fact that

a brief conference on difficult question, and took no put the shoulder to place in the model, but it would not permit to place glass between the long cardy its not been or in of the proper angle. The doctor then testified that at the time of the crash the plaintiff had a limited action in his arm and shoulder. The doctor was long asked if upon his examination and treatment of the plaintiff he would tell the jury that if complete normal and limited motion. (her objection the doctor answered, "the injury, obviously, would be the final thing that would cause that." In order rehabilitate the doctor said that one of the reasons for such disability was that he merely was not of normal frame, and that his injury aggravated condition in the plaintiff. Considering the question and answers, we do not consider there was any error in overruling the objection (Colorado Union Pacific Co. v. Roberts, 70 Ill. App. 655; City of Chicago v. Hatter, 207 Ill. 271.)

Defendant complains of the instruction in the language of the statute that every railroad corporation running cars there would remove from its floor of any of all trash crossings within the limits, all lumber, scrapbery and cross ties for a distance of not less than 200 feet from either diagonal from such cross crossing. Neither of the trucks alleged the negligence, nothing or part of the evidence there such statute may be found and so here has considerable difficulty in locating it. It will be found in Ch. 111-2/3, par. 62, Sec. 62, v. 2024, Revised Statute of 1940. We do not consider there was any error in the giving of such instruction - (see Dunlap v. City of Cahokia, 403 Ill. 641, 648.) particularly in view of the fact that

defendant's given instruction No. 6 told the jury that even though they might believe from the evidence that there were some weeds on the right of way, yet if they further believed that the plaintiff, by the exercise of reasonable care, could have observed the approach of the train notwithstanding such weeds, and that he failed to see or hear or observe the train, and such failure was negligence on his part and contributed to the cause of the collision, then the jury should find the defendant not guilty.

Plaintiff's given instruction No. 8 told the jury that if they believed from a preponderance of the evidence that the defendant was guilty as charged in the complaint or some part thereof, and that plaintiff's automobile was injured as set forth in his complaint by reason of the negligence of defendant, if any, then in arriving at plaintiff's damages to the automobile, if any, the jury should take into consideration the evidence, if any, as to the difference between the fair cash market value of the automobile before it was injured and the fair cash market value of the same after it was injured. Defendant's only complaint as to such instruction is that it left "the door wide open for the jury to find for the plaintiff if the plaintiff proved anything charged in the complaint * * * but it taints all plaintiff's instructions with the idea * * * that if plaintiff proved anything" he would be entitled to a verdict. This was the only instruction given for plaintiff as to the measure of damages to his personal property. The uncontradicted proof was that the value of the automobile before the accident was $600.00 and that after the accident

it was sold as junk for $50.00. No complaint is made as to the competency of such proof. Defendant's given instruction No. 3 told the jury that the plaintiff could not recover unless he proved that at and immediately before the collision he was in the exercise of due care and caution for his own safety, that the defendant was guilty of negligence, and that such negligence of the defendant, if any, was the proximate and direct cause of the injury to the plaintiff, and that if the jury found that the plaintiff had failed to prove all of such propositions by a preponderance of the evidence, or any one of them, then he could not recover, and the defendant should be found not guilty. We do not consider that the jury was misled by or that there was any error in the giving of instruction No. 8.

Defendant's refused instruction No. 1 stated that there is no presumption from the happening of the collision in question or from any injury suffered by plaintiff that defendant was guilty of negligence or that plaintiff was in the exercise of due care. We do not consider there was any reversible error in the refusal of said instruction, particularly in view of the directions given in defendant's given instruction No. 3, and in other instructions given at the request of the defendant.

The first part of defendant's refused instruction No.6 was fully covered by defendant's given instruction No. 4. The remainder of defendant's refused instruction No. 6 stated that if the jury believed from the evidence that plaintiff had an opportunity to discover the approach of the train in time to have avoided the collision, and that

it was sold as junk for $20.00. No conclusion is made as to the competence of such proof. Defendant's given instruction No. 7 tells the jury that the plaintiff could not recover unless he proved that at and immediately before the collision he was in the exercise of due care and caution for his own safety; that the defendant was guilty of negligence, and that such negligence of the defendant, if any, was the proximate and direct cause of the injury to the plaintiff, and that if the jury found that the plaintiff had failed to prove all of such propositions by a preponderance of the evidence, or any one of them, then he could not recover, and the defendant should be found not guilty. We do not consider that the jury was misled by or that there was any error in the giving of instruction No. 8.

Defendant's refused instruction No. 1 states that there is no presumption from the happening of the collision in question or from any injury suffered by plaintiff that defendant was guilty of negligence or that plaintiff was in the exercise of due care. We do not consider there was any reversible error in the refusal of said instruction, particularly in view of the directions given in defendant's given instruction No. 8, and in other instructions given at the request of the defendant.

The first part of defendant's refused instruction No.6 was fully covered by defendant's given instruction No. 4. The remainder of defendant's refused instruction No. 6 stated that if the jury believed from the evidence that plaintiff had an opportunity to discover the approach of the train in time to have avoided the collision, and that

he failed to stop and such conduct on his part was the proximate cause of the collision, then the jury should find the defendant not guilty. It is our opinion that such portion of refused instruction No. 6 was fully covered by defendant's given instructions Nos. 2, 3, 4, 6 and 13.

Defendant's refused instruction No. 7 was properly refused for the same reasons.

The refusal of defendant's instructions Nos. 8, 9, 11, and 12 is complained of. Such instructions are not set out in words or in substance in the brief. Therefore we do not consider it necessary to discuss them. However, we have examined such refused instructions, as shown in the abstract, and do not consider there was any error in their refusal.

The judgment of the trial court is affirmed.

Affirmed.

Abstract

General No. 9508. Agenda No. 3.

IN THE APPELLATE COURT

OF ILLINOIS

THIRD DISTRICT

OCTOBER TERM, A. D. 1946.

300 I.A. 130

~~IN THE MATTER OF~~	WRIT OF ERROR to COUNTY COURT,
~~VALERIE HINTON, alleged to be neglected.~~	of ADAMS COUNTY, ILLINOIS.
LUCY HINTON, ~~RALPH T. HINTON, JR.~~, and VALERIE HINTON, by LUCY HINTON, her next friend,	
Plaintiffs in Error,	
-vs-	
THE PEOPLE OF THE STATE OF ILLINOIS, ~~and~~ RALPH T. HINTON, Sr., and Ralph T. Hinton, Jr.,	~~CHARLES S. ROSS,~~
Defendants in Error.	~~Judge Presiding.~~

Hayes, J.:

Doctor Ralph T. Hinton filed a petition in the county court of Adams County setting forth that Valerie Hinton (his grand daughter) living in said county, was a neglected female child of the age of five years; and made Doctor Ralph T. Hinton, Jr., and Lucy Hinton, father and mother of said child, defendants to said petition. The father joined in the trial with the grandfather and testified against the mother and asked for the change of guardianship from the mother to his father, the petitioner. The petitioner hired Harold A. Lewis special counsel, whom from the record, occupied the place as principal counsel. Lewis made a vigorous prosecution in the interests of the petitioner, and although an assistant States Attorney took

part throughout the trial, it is apparent from the record that Lewis was master of the situation rather than the public prosecutor.

Lucy Hinton, Valerie's Mother, had been married once before the marriage in question and had a son by her first marriage, Peter Moore, who went by the name of Peter Hinton. Peter was eleven years old at the time of the trial. Valerie was the only child of the second marriage. Doctor Ralph T. Hinton, Jr., enlisted in the medical division of the United States in 1942 as a psychiatrist, and was still in the military service at the time of trial and testified that he expected to be discharged in June, 1947. Lucy Hinton lived in Chicago with her son Peter, her mother and father. During the war years, Ralph T. Hinton and Lucy Hinton lived in various camps during part of which time they had Valerie and Peter with them and part of the time Valerie was with her grandfather and grandmother in Quincy. It appears that the grandparents had become very much attached to Valerie. Ralph Hinton and Lucy Hinton lived together until the first of August, 1945. At that time Valerie went to Quincy to be with her grandparents, the Hintons and Lucy Hinton and her son Peter went to her parents in Chicago. The following December at the direction of Ralph T. Hinton, Jr., Lucy Hinton took the two children and went to his parent's home in Quincy. During February and March she took Valerie to her home in Chicago and afterward came back to Quincy with Valerie and stayed with the two children in the grandparent's home in Quincy. In the latter part of April, there was a disagreement between the Grandmother and Lucy Hinton,--the grandmother taking the position that Lucy Hinton favored Peter over Valerie. Lucy Hinton then wrote to the father and asked him what he would prefer. To

straighten the matter out she took Peter and went to her parents in Chicago and left Valerie with the grandparents. The following October the husband met Lucy Hinton in a railroad station in Chicago and asked for a divorce and offered to agree to the joint custody of Valerie, being six months each. She replied that she would not do anything which would break up the family. He insisted that he wanted a divorce because she made him feel inadequate and inferior and that there were things in life more important than love. She refused him the divorce. Up to this time he had made no complaint of Peter's behavior towards his sister Valerie to Mrs. Hinton. Shortly after the Chicago conversation Hinton wrote his wife that since she had not agreed to a divorce and divided custody of Valerie he was going to bring suit and charge her with neglect. Mrs. Hinton testified that she arranged to take Valerie and Peter with her and go to Chicago with her parents but that her husband insisted Valerie stay with his parents for a while and she agreed to that if in a short period she could come to her in Chicago. She kept insisting on Valerie's return to her and finally went to Quincy on November 4, 1945 without any notice that the suit had been filed and found an order had been entered by the county court depriving her of the custody of her child pending the suit. Witnesses in behalf of the petition were Doctor C. C. Atherton, psychiatrist, the petitioner Ralph T. Hinton, a psychiatrist, the father R. T. Hinton, Jr., a psychiatrist, Alma Hinton the grandmother, and Elizabeth Hinton Weaver, the sister of Doctor Ralph T. Hinton, Jr., all immediate relatives of the petitioner. They all testified to unusual and startling sexual acts of Peter towards his little sister that occurred months before filing this petition and none of which had ever been reported to the

mother until Doctor Hinton Jr., had made a demand on Lucy Hinton for a divorce and been refused.

This being a people's case it should properly have been carried on by the States Attorney of the county in an impartial manner and not turned over to a special prosecutor. Although the law permits under certain circumstances the hiring of additional counsel to aid the prosecutor, this is always done at the discretion of the trial court and it is the duty of the trial court to see that no injustice is done. In this case the court did not exercise sound discretion in allowing the special attorney to carry on the proceedings as they were carried on, and allow the case to be used as an opening wedge for divorce. The error was sufficient in nature as to cause a reversal.

At the time petition was filed, petitioner had exclusive control of Valerie who had been in his custody for weeks before. The allegation contained in the petition that she was then a neglected and dependent child in the county of Adams was false and a fraud, and if the States Attorney had acted as a quasi judicial officer and examined the merits of the case a petition would never have been filed under the circumstances here. It is the duty of the prosecutor to protect the defendant and see that law and justice is done as much as it is to enforce the law.

It is a matter of common knowledge that male children generally do not have sex impulses at the early age of eleven and it is not necessary to consult a psychiatrist for this knowledge. The record discloses from the testimony of Peter himself that he is a normal, healthy child. His description of his love towards his sister is that of any boy of eleven and when his sister came in court and saw him she showed the same sweetness. In fact the two children acted more like

ordinary human beings than some of the adult witnesses.

Mrs. Lucy Hinton is the mother of each of them and she showed the natural motherly impulses towards her children. Although state witnesses as a whole showed much bitterness towards Lucy Hinton, upon undergoing cross examination they each admitted she was a good woman, behaved herself, had no vices nor bad habits, but they claimed she favored her son over her daughter. This did not disclose itself until after she refused to be divorced by her husband. Her husband did not hesitate in joining the other witnesses in claiming to have observed the abnormal sexual acts of Peter towards his little girl which he admits he never reported to the Mother and used as an excuse that it would make her angry.

In weighing the evidence it is hard to reconcile Dr. Hinton, Jr.'s statement on the stand as to the unnatural sexual acts and then his proposition to Mrs. Hinton that he would turn the little girl over to her six months of each year. A mother who bears a child and has done her full duty as a mother should not have that child taken away from her unless the proofs are clear and established to a degree of certainty in keeping with the responsibility of separating a child from its mother, particularly a girl of tender years. If Dr. Hinton, Jr., and his relatives feel he is entitled to a divorce or the custody of Valerie he should apply to a court of chancery under the right label and not use the county court in an effort to obtain his ends.

We are therefor compelled to hold that the plaintiff in error Lucy Hinton and Valerie Hinton did not have a fair and legal trial and the order of the county court is not sustained by the manifest weight of evidence. For the reasons herein assigned the order of the county court is hereby reversed with

directions to dismiss the petition.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS THE PETITION.

Abstract

General Number 9513. Agenda Number 6.

IN THE APPELLATE COURT
OF ILLINOIS
THIRD DISTRICT
OCTOBER TERM, A. D. 1946.

3 I.A. 130

WILLIAM E. SADDLER, Plaintiff-Appellant,	APPEAL FROM THE CIRCUIT COURT OF McLEAN COUNTY.
-vs-	
THE NATIONAL BANK OF BLOOMINGTON, a Corporation, Defendant-Appellee.	~~HONORABLE WILLIAM S. BARNETT, Judge Presiding.~~

HAYES, J.:

William E. Saddler filed his complaint in the Circuit Court of McLean County against the National Bank of Bloomington on December 11, 1945, alleging breach by the Bank of a lease of a safety deposit box. The complaint alleged that on September 30, 1941, plaintiff leased Box 1081 from the defendant and signed a printed lease customarily used by the Bank. On October 5, 1942, plaintiff in company with Ada Saddler, his sister, called at the bank and executed a new lease. This lease acknowledged receipt of $2.78 rent and government tax therein from Mr. or Mrs. William E. Saddler; in consideration thereof, lessor leased to defendant, Box 1081, for one year from date subject to renewal. The lease was signed for the bank by Nellie G. Roberts, custodian, and by William E. Saddler as lessee. In a further provision William E. Saddler appointed Ada Saddler, as his deputy and

agent "to have access to the box * * * to take and remove from or add to the contents thereof, and have full and absolute control over the same * * *". Ada Sadler signed the lease as deputy. Thereafter until plaintiff was inducted into the army in 1943, plaintiff and his sister were given access to the box by the custodian who controlled the master key whose use together with the key kept by plaintiff was necessary to open the box.

The complaint further alleged that after plaintiff entered the army, his wife Emma Sadler "discovered among a bunch of keys left with her" by plaintiff, the key to the box and on August 20, 1943 appeared at the bank and requested entry to the box from the custodian. Her request was granted after she signed as lessee, the lease was executed ~~xxx~~ on October 5, 1942 and thereafter she was permitted access to the box regularly.

The complaint further states that plaintiff had in the box $4,000.00 in currency, a cashier's check for $1,000.00 and government bonds payable to plaintiff and Emma Sadler and valued at $3750.00. All of these were removed by Emma Sadler, the bonds cashed and all of the money squandered. There are numerous allegations in the complaint stating that Emma Sadler did not have access to the box prior to plaintiff's induction into the armed forces, that neither plaintiff or Ada Sadler authorized the bank to grant Emma Sadler access to the box and that such access was without their knowledge and consent. Plaintiff asked judgment for $8000.00.

On January 7, 1945 defendant filed a motion to dismiss the complaint on the grounds that no violation of any duty owed by defendant to plaintiff was shown, that the complaint indicated that defendant was authorized to admit Emma Sadler to the box and that the cause of action was barred by plaintiff's own negligence. Thereafter plaintiff was granted leave to amend

the complaint and such amendment was filed, changing among other things the allegation that Emma Saddler "discovered among a bunch of Keys left with her" the key to the box, to the allegation that Emma Saddler "discovered among plaintiff's personal effects and belongings a certain bunch of keys, one of which was the key to said safe deposit box."

On January 30, 1946 defendant moved to dismiss the amended complaint setting forth the same grounds that were used to allow the original complaint. In addition defendant alleged that the copy of the lease dated October 5, 1942 attached to the complaint as an exhibit was not a correct copy because it did not contain Emma Saddler's allegation regarding discovery of the keys and was inconsistent with the statement in the original complaint. On February 1, 1946, defendants filed an amended motion, asking that the amended complaint be dismissed or in the alternative to dismiss the original complaint if the amendment were stricken. On the same day, defendants filed a motion to strike the amendment to the complaint.

On March 2, 1946, the Circuit Court ordered that its amendment be stricken, the amended complaint be dismissed and that plaintiff take nothing by his suit. Plaintiff has appealed to this court.

We believe the circuit court erred in striking plaintiff's amendment to the complaint. Section 46 of the Civil Practice Act (Ill. Rev. Stat. 1945, Ch. 110, Sec. 170) gives litigants broad powers to amend pleadings and trial courts have frequently been directed to be liberal in allowing amendments. Kylavos vs. Polichrones, 316 Ill. App. 444, 45 N.E. (Ed) 99. Assuming that defendant's contention that the original complaint admits contributory negligence and that

this is a bar to an action on the lease, we see no reason why plaintiff should not be permitted to remedy this improvident admission by amendment. City National Bank & Trust Company vs. Oberheide Coal Company, 307 Ill. App. 519; 30 N. E. (Ed) 753.

The court improperly dismissed the amended complaint; the judgment of the circuit court of McLean County is reversed and the cause remanded to that court.

REVERSED AND REMANDED.

Abstract

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

General No. 9498 Agenda No.1

Virgil O. Whipp, Trustee in Bankruptcy of Helen Houghton Grider, Bankrupt, et al., Appellees,	Appeal from Circuit Court of Menard County, Illinois.
vs.	
Helen Houghton Grider, et al. (Ray R. Grider, Administrator of the Estate of Marshal Grider, deceased, et al., Appellants). (Verneena Aden, et al., vs. James William Houghton, et al.))	

Wheat, J.

This is an appeal from a decree setting aside as frandulent a warranty deed by Helen Houghton Grider and Ray R. Grider, her husband, conveying an interest in real estate in Menard County, Illinois, to Marshal S. Grider, father of Ray R. Grider.

The complaint alleges that the plaintiff, Fred O. Conover and Mary E. Nance, Executrix, are creditors of Helen and Ray Grider by virtue of a mortgage made by them under date of March 4, 1920, foreclosure of which was begun May 16, 1932, and which resulted in deficiency judgments on October 28, 1933, in favor of plaintiff Conover in the sum of $4781.90 and in favor of plaintiff Mary E. Nance, Executrix, in the sum of $2869.14. The complaint further charges that Helen Houghton Grider, on December 14, 1933, filed her voluntary petition in bankruptcy and was, on January 5, 1934, adjudged a bankrupt, at which time, Virgil O. Whipp was appointed Trustee in such bankruptcy, duly qualified as such, and since has

been so acting; that executions were issued on said judgments and returned unsatisfied; that the claims of each of said judgment creditors were duly filed and allowed in said bankruptcy but remain unpaid; that prior to the rendition of said judgments said Helen Houghton Grider was, on June 2, 1932, the owner of an undivided one-sixth interest in certain real estate in Menard County, Illinois, subject to the life estate therein of her mother, on which said date the said Helen Houghton Grider was indebted and liable to different persons in excess of the sum of $8000; that on such date the said Helen Houghton Grider and her husband, Ray R. Grider, made a pretended conveyance purporting to be a warranty deed to the father of Ray F. Grider, to-wit: Marshal Grider, of said real estate, for a pretended consideration of One Dollar, which deed was recorded in the Recorder's Office of said county in Book 72 of Deeds at page 532; that said conveyance was not a bona fide transfer of title but was a mere sham made for the purpose of defrauding the plaintiffs; that there was no consideration for such conveyance and that said real estate is yet held in secret trust by the grantee for the benefit of the grantors, and that the execution and delivery of said deed did in fact make the said Helen Houghton Grider insolvent so that she had insufficient personal property to pay her liabilities, including the claims of the plaintiffs; that at and before the making of such deed, the grantor had knowledge of the claims of the plaintiffs and knew that she was thereby making herself insolvent and that such conveyance was fraudulent. The plaintiffs pray that said deed may be held a fraudulent conveyance, be declared void and set aside.

The answer admits the making of the deed in question, the indebtedness of Helen and Ray Grider at that time in excess of $9000, and the subsequent bankruptcy of Helen Grider, but alleges that the deed to Marshal Grider was a bona fide transaction and made for a valuable consideration in excess of $7000, and denies the existence of any trust and denies that the plaintiffs are entitled to any relief.

The cause was referred to the Master in Chancery to take proofs and report his findings, after which, the Master reported, finding that the deed was valid. Objections were filed which later were ordered to stand as exceptions. The court approved the Master's report as to the proofs but sustained the exceptions and entered a decree setting aside the deed in question. By agreement of the parties, the real estate was sold in a separate partition suit and the proceeds received from the subject matter of this deed were ordered, in the above mentioned decree, to be paid to Virgil O. Whipp, Trustee in Bankruptcy of Helen Houghton Grider, to be held by the Trustee, subject to the order of the United States District Court for disposition among her unpaid creditors.

For an understanding of the issues it is necessary to briefly review some prior transactions. In 1920, a 45-acre parcel of real estate was purchased in the name of Ray Grider from one Groves. The purchase price of $13,500 was handled as follows: $500 was paid in cash; Ray Grider and his father, Marshal Grider, made their note for $5000 to one Constance Trackelton and the proceeds of that note were paid to Groves as part of the purchase price, and in 1934, Marshal Grider paid this note out of funds which he borrowed from the Federal Land Bank; Ray and Helen Grider executed their notes secured by a mortgage on said 45-acre parcel, one for $5000 and one for $3000, the former becoming the property

of the plaintiff Conover, and the latter becoming the property of one Hardin W. Nance, these being the notes on which deficiency judgments were subsequently taken upon foreclosure and being the subject matter of the claims of the plaintiffs Conover and Nance; for at least ten years, interest was paid on these notes, a part of which was furnished by Ray Grider's father, Marshal Grider.

It is urged by the defendants that Ray and Helen Grider were indebted to Ray's father, Marshal, the grantee in the controversial deed, in an amount equal to or in excess of the value of the one-sixth interest of Helen in and to the real estate. As to this, the testimony shows that between 1926 and 1930, Marshal Grider loaned to Helen and Ray Grider, for family purposes, about the sum of $2000, included in which amount was an item of $117.25 to build a garage on the 45-acre parcel; $1320 for the payment of interest on the 45-acre parcel purchase; $95.39 for payment of taxes on the 45-acre parcel; $35 to pay installment on washing machine; $204.79 for payment on family car, together with miscellaneous smaller items. In addition to these amounts, Ray also borrowed from his father the sum of $180 in the fall of 1926, which appears to have been for family purposes. If interest were computed at five per cent on these amounts, the total would have reached in excess of $2600, principal and interest, as of the date of the deed, June 2, 1932. There also should be considered the payment by Marshal Grider of the note which he signed to obtain the sum of $5000 which was used as a part of the purchase price of the 45-acre parcel, which tract was used by Ray and Helen Grider, as their home, for at least twelve years. The testimony indicates that Helen Grider and her father-in-law, Marshal Grider, both contemplated that she was indebted to him just as Ray Grider was indebted to his father. Prior to the death of Helen Grider's father, on February 12, 1930, it appears that she had nothing with which to pay on such obligatio

but by the Will of her father, she acquired her one-sixth interest in the real estate which is the subject matter of this suit, which interest was subject to the life estate of her mother.

As to the value of this one-sixth interest, numerous witnesses testified and the evidence is quite voluminous and conflicting. According to the highest figures placed upon the same, deducting the value of the life estate, the one-sixth interest of Helen Grider in such real estate would have been approximately $4000. The testimony of other witnesses placed the value of this interest as low as $1800, with other witnesses testifying as to values between these two extremes.

As to whether there was any consideration for the conveyance to Marshal Grider, it is our opinion that at such time, Helen Grider and her husband were indebted to the grantee in a sum in excess of $2000 and that such pre-existing debt was a good consideration as against other creditors. In the case of First National Bank of Flora vs. Cunningham, 267 Ill. App. 430, the court said: "Services previously rendered by a grantee to her grantor constitute a legal consideration for the deed . . . An existing debt is a valuable consideration for a deed . . . A conveyance by a debtor to his creditor in payment of an antecedent bona fide debt will be sustained if the amount of the debt is not materially less than the fair and reasonable value of the land . . . A debtor has a right to prefer a creditor, when he acts without fraud, leaving nothing for his other creditors to resort to. There must be evidence to show a fraudulent intent before a conveyance made upon a valuable consideration may be held fraudulent as to creditors . . The general rule is that where property is transferred in payment of a debt, fraud cannot be imputed to the creditor thus preferred because of his knowledge that the debtor is insolvent, or that the transfer is of all the debtor's property."

As to whether or not this consideration was adequate, it must be kept in mind that in considering the value of the real estate the same was subject to an outstanding life estate and that, in general, outstanding life estates have a depressing effect on the marketability and value of remainders. Strangers ordinarily hesitate to buy an undivided interest in real estate owned by a family, rendering the market limited generally to members of the family. Regardless of this, we find that there was no such inadequacy of consideration as to justify a finding of fraud from that circumstance alone. In the case of Third National Bank of Mt. Vernon vs. Norris, 331 Ill. 230, grantor conveyed to his niece certain real estate in payment of a $10,000 debt, the value of the real estate being appraised as low as $9600 and as high as $17,600. The court sustained the transfer with the finding: "There was clearly no such inadequacy of consideration as to justify a finding of fraud from that circumstance alone."

It seems unquestionable that when, on June 2, 1932, Helen Grider and her husband conveyed the premises in question to Marshal Grider, she was rendering herself insolvent and was preferring one creditor over another. This fact alone does not justify a finding of fraud nor render the transaction invalid. In the case of Albers vs. Zimmerman, 376 Ill. 306, the court said: "The well-established law is that a debtor may prefer one creditor when he acts without fraud, even though he transfers all his property to the preferred creditor. A debtor may prefer one creditor although he knowingly hinders and delays his other creditors in the collection of their claims, provided the conveyance is made in good faith to discharge the preferred claim."

As to the subject of fraud, it is clear that fraud will never be presumed but must be alleged and proved. In this case there is not such proof nor is there any proof that the real estate

was held by Marshal Grider in secret trust for the benefit of Helen Grider. The only evidence on that point is the testimony of Helen and Ray Grider, who stated there was no understanding, written or oral, that Marshal Grider was to hold the property for either or both and that neither retained any interest in property which was conveyed to Marshal Grider. The fact that the parties to this deed were related subjects the transaction to a closer scrutiny than if the parties were strangers, but, as was said in the case of Byerly vs. Byerly, 363 Ill. 517: " * * * that these parties are brothers does not of itself attain the dignity of proof of fraud, nor is there any presumption that their transactions with one another are fraudulent. Men are presumed to be honest, and their dealings with one another, even though they are brothers, are assumed to be just and without taint. Fraud is never to be pre-supposed but must be established by convincing proof and by the greater weight of the evidence. (Cases cited). A brother may protect another brother who is his creditor if the transaction is made in good faith. Nor does the fact that the parties are related as brothers create a presumption that there is not a bona fide indebtedness owing by one to the other. The conveyance of the three tracts was made for an adequate consideration."

In our opinion, the Circuit Court erred in entering the decree setting aside the conveyance in question. In as much as the undivided one-sixth interest represented by this conveyance has been sold by agreement in partition and the proceeds placed in the hands of the Master in Chancery, the decree of the Circuit Court is reversed and the cause remanded with directions to dismiss the complaint to set aside this deed, for want of equity, and to award the proceeds of the sale of the interest represented by this deed and accrued income therefrom to Ray R. Grider, Administrator

of the Estate of Marshal S. Grider, deceased. ~~The costs are to be assessed one-half against the plaintiffs and one-half against the defendants.~~

Reversed and remanded
with directions.

43566

DENOTRIA MOORE, Appellee,	)	
v.	)	APPEAL FROM SUPERIOR
ALFRED F. SAUTTER, FRANK BUDRECK and JOSEPH BUDRECK, individually, and doing business as BUDRECK TRUCK LINES, Appellants.	)	COURT OF COOK COUNTY.

50 A

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

A personal injury suit in which a jury returned a verdict finding Alfred F. Sautter, individually, and Frank Budreck and Joseph Budreck, individually, and doing business as Budreck Truck Lines, defendants, guilty, and assessing plaintiff's damages at $15,000. Defendants appeal from a judgment entered upon the verdict.

The accident occurred on September 10, 1940, at or near the intersection of 43d street and State street, Chicago. The day was dry and clear and the accident happened in the late afternoon. There are stores, gas stations and business houses at the intersection and many people pass over the intersection around four o'clock p.m., the time of the accident. State street is a north and south six lane highway and 43d street is an east and west four lane highway. Three lines of cars can travel south on State street and three lines of cars can travel north on that street at the same time. There are two sets of street car tracks in the center of each street, but the tracks on 43d street do not run west of State street. Some State street cars turn east on 43d street; others go directly south on State street. There is a "painted safety island" just west of the southbound track and about twenty-five or thirty feet north of 43d street.

4256.

CATHERINA SCOTT,
Appellee,

v.

ALFRED F. SUTTER, STATE
TRUSTEE and TRUST COMPANY
INDIVIDUALLY, and doing
business as TRUSTEE TRUCK
LINES,
Appellants.

Appeal from Superior
Court of Cook County.

8 0 1 L A. 1 3 8

Mr. Justice Gridley delivered the opinion of the court.

A personal injury suit in which a jury returned a verdict finding Alfred F. Sutter, individually, and Trust Company and Joseph Turner, individually, doing business as Trustee Truck Lines, defendants, guilty, and assessing plaintiff's damages at $15,000. Defendants appeal from a judgment entered upon the verdict.

The accident occurred on September 11, 1924, at or near the intersection of 43d street and State street, Chicago. The day was dry and clear and the accident happened in the late afternoon. There are stores, gas stations and business houses at the intersection and many people walk over the intersection around four o'clock p.m., the time of the accident. State street is a north and south street with Lake Michigan and 43d street is an east and west four line thoroughfare. Street cars of course can travel south on State street and street cars of course can travel north on that street at the same time. There are two sets of street car tracks in the center of such street, but the tracks on 43d street do not run east of of the street. Some State street cars turn east on 43d street; others go directly south on State street. There is a "pedestal safety island" just west of the southbound track and about twenty-five or thirty feet north of 43d street.

Plaintiff's evidence tends to support the following facts: That she was a young woman in good health and had finished her day's work shortly before she boarded a south bound State street car; that as the car was crowded she stood on the front platform and as the car approached 43d street she could see that there was nothing on the track ahead of the car; that the car stopped at the intersection of 43d street and State street with its front end about four or five feet north of the north crosswalk of 43d street, and when the motorman opened the door she was the first passenger to alight from the car; that she was going to 43d street and Michigan avenue, which was two blocks east of the intersection; that after she alighted she walked to her left (in an easterly direction) around the front of the standing car to a point between the southbound and northbound street car tracks; that at that point she was about a foot east of the southeast corner of the standing street car; that she looked to the south to see if any traffic was coming, "to see if I could cross the street at that time"; that there was no street car in front of the car from which she had alighted and there was no street car turning east on 43d street at that time; that as she stood at the said point she saw an automobile coming north on State street and crossing 43d street; that the automobile was inside of the safety island located south of 43d street; that she stopped to let this automobile pass her and it did pass her; that she saw a truck coming north on State street and saw it crossing 43d street; that this truck was about the middle of 43d street when she last saw it; that she stood still at the said point as it seemed to her that the truck was coming behind the automobile which had passed her and in the same lane; that the truck struck her and caused the injuries for which she sued; that Alfred F. Sautter, defendant, the driver of the truck, had been over that place two or three hundred times prior to the

Plaintiff's evidence tends to support the following facts: That she was a young woman in good health and finished her day's work shortly before she boarded a south bound State street car; that as the car was crossing she stood on the front platform and as the car approached 43d street she could see that there was parking on the street side of the car; that the car stopped at the intersection of 43d street and State street with its front car about four or five feet north of the north crosswalk of 43d street, and then the motorman opened the door and her two first companions to alight from the car; that she was going to 43d street and Indiana avenue, which was two blocks east of the intersection; that after she alighted she walked to her left (in an easterly direction) across the front of the standing car to a point between the motorman and northbound street car tracks; that at that point she was about a foot west of the southbound tracks on the southbound street car; that she looked to the south to see if any hazards was coming, "to see if I could cross the street or not safely"; that there was no street car in front of the car from which she had alighted and there was no street car coming east on 43d street at that time; that as she stood at the said point the car an automobile coming north on State street and crossing 43d street; that the automobile was inside of the safety island between the north of 43d street; that she stopped to let this automobile pass her and it did pass her; that she saw a truck coming north on State street and saw it crossing 43d street; that this truck was north the middle of 43d street when she last saw it; that she stood still at the said point as it seemed to her that the truck was coming behind the automobile which had passed her and in the same lane; that the truck struck her and caused the injuries for which she sued; that Alfred F. Bartter, defendant, the driver of the truck, had been over that place two or three hundred times prior to the

day of the accident and knew that the intersection of 43d and State streets about the time the accident occurred was a busy intersection and that people crossed it from north to south and from east to west; that at the time of the accident and just prior thereto Sautter did not notice whether any people were crossing the intersection; that Sautter drove the truck over the intersection at the rate of thirty-five or forty miles an hour; that he struck plaintiff at the front end of the standing street car, which was fifty-two feet long, and that after the accident she was lying at the rear door of the street car, and that he ran the truck fifty or seventy-five feet beyond the point where she was lying before he brought the truck to a stop; that after the accident plaintiff was "hanging onto the left front fender of the truck * * * half way off, over the left side of the truck"; that at the time of the accident there was no traffic on State street to the right, or east, of the truck and there were no cars parked along the east curb of State street; that there was no traffic going east or west on 43d street.

Defendants' theory of the case is: That defendant Sautter was driving the truck "north on or a little to the right of the northbound State Street street car tracks"; that he was traveling at a speed of about eighteen to twenty miles an hour and that when he reached the intersection of 43d street he stopped to allow the east and west traffic to pass; that when that traffic passed he started across 43d street and at that time there were two southbound State street cars north of 43d street; that the first car was a "Root Street" car; that Root street cars turn east on 43d street; that the two cars were standing; that the Root street car started up and traveled a few feet out into 43d street and turned slightly to the east, intending to proceed in that direction on 43d street; that the motorman of the Root street car saw the truck driven by Sautter proceeding north on the northbound street

day of the accident and knew that the intersection on 43d and these streets about the time the accident occurred was a busy intersection and that people crossed it from north to south and from east to west; that at the time of the accident and just prior thereto Lantzer did not notice whether any people were crossing the intersection; that another driver the truck over the intersection at the rate of twenty-five or forty miles an hour; that he struck plaintiff at the north end of the southbound street car, which was fifty-two feet long, and that after the accident he was lying at the rear door of the street car, and that he ran the front fifty or seventy-five feet beyond the point where she was lying before he stopped the truck to a stop; that after the accident plaintiff was taken onto the left front fender of the truck [illegible] "I'LL say so", [illegible] "I'll ride on top of the truck"; that at the time of the accident there was no traffic on the street to the right, or east, of the intersection [illegible] there was no traffic going east or west on 43d street.

Defendants' theory of the case is: that plaintiff [illegible] was driving the truck "north on or a little to the right of the northbound tracks of the street car tracks"; that he was travelling at a speed of about eighteen to twenty miles an hour and that when he reached the intersection of 43d street he endeavored to allow the east and west traffic to pass; that when that traffic passed he started across 43d street and at that time there was no southbound State street car north of 43d street; that the first car was a "foot brake" car; that foot brake cars turn east on 43d street; that the two cars were standing; that the foot brake car started up and traveled a few feet out into 43d street and turned slightly to the east, intending to proceed in that direction on 43d street; that the motorman of the foot brake street car saw the truck driven by Lantzer proceeding north on the northbound street

car tracks and stopped his car to allow the truck to proceed northward; that as Sautter's truck proceeded north on State street and to the north of 43d street the Root street car and the second State street car, from the front of which plaintiff alighted, were about four or five feet apart; that as he passed the Root street car he blew his horn; that he was going between eighteen and twenty miles an hour at that time; that just as he passed the Root street car a colored lady came running out from between the two street cars; that he immediately slammed on his brakes as hard as he could and threw the truck to the right; that the woman was about four feet from his truck when he first saw her and that as she ran she was looking east; that the left front fender of his truck struck her; that when he stopped his truck the rear wheels and front wheels were off the northbound track and were headed toward the east, and the truck obstructed the northbound street car track after it stopped. There was evidence that supported defendants' theory of fact.

In our judgment the contention of defendants, strenuously argued, that plaintiff was guilty of contributory negligence as a matter of law, cannot be sustained. As stated in Moran v. Gatz, 390 Ill. 478, 486: "Each case must be determined from its particular facts. The question of contributory negligence is one which is pre-eminently for the consideration of a jury. It cannot be defined in exact terms and unless it can be said that the failure of the plaintiff to look again was so palpably contrary to the conduct of a reasonably prudent person as to show contributory negligence, the issue is one for the jury." In Blumb v. Getz, 366 Ill. 273, the decedent, in broad daylight, walked into a traffic lane of a State highway and stooped to recover a glove which he had dropped, and while in this position he was struck by defendant's automobile. The defendant in that

car tracks and stopped his car to allow the women to proceed northward; that as Mastrey's truck approached within the street and to the north of the right of the first street car and the second track street car, from the front of which [illegible] alighted, were about four or five feet apart; that if he passed the back street car he had not gone, that he was going between alighted and twenty miles an hour; that there just as he passed the [illegible] street car a colored lady came running out from between the two cars; that [illegible] [illegible] on his orders he had at the curb and turned the truck to the right; that the woman was about four feet from the curb; that the first saw her and that; in the [illegible] [illegible], that the left front fender of his truck struck her; that then he stopped his truck the rear wheels and front wheels were off the ground tracks and were [illegible] [illegible] the right, and the right observed the mechanical effect car track which it stopped. There was evidence that [illegible] [illegible] [illegible] or left.

In our judgment the contention of defendants, strenuously urged, that plaintiff was guilty of contributory negligence as a matter of law, cannot be sustained. As stated in [illegible] [illegible], [illegible] [illegible]: "Such case must be determined from its particular facts. The question of contributory negligence is one which is pre-eminently for the consideration of a jury. It cannot be defined in exact terms and unless it can be said that the failure of the plaintiff to look again was so palpably contrary to the conduct of a reasonable prudent person as to show contributory negligence, the issue is one for the jury." In [illegible] v. [illegible], [illegible] [illegible], the decedent, in broad daylight, walked into a traffic lane of a state highway and stopped to recover a glove which he had dropped, and while in this position he was struck by defendant's automobile. The defendant in that

case strenuously contended that under such a state of facts the plaintiff was guilty of contributory negligence as a matter of law, but the contention was not sustained, the court observing (p. 277): "The question of contributory negligence is one which is preeminently a fact for the consideration of a jury. It can not be defined in exact terms and unless it can be said that the action of a person is clearly and palpably negligent, it is not within the province of the court to substitute its judgment for that of a jury which is provided for the purpose of deciding this as well as the other questions in the case." The cases cited by defendants in support of their contention differ from the instant one upon the facts. One of the cases relied upon by defendants is Moran v. Gatz, 324 Ill. App. 45, but the decision in that case was reversed by the Supreme court (390 Ill. 478, 486.) We are firm believers in the jury system and are in full accord with the rule stated by the Supreme court in People v. Hanisch, 361 Ill. 465, 468, that "The utmost caution should be exercised not only by the trial courts but by the reviewing courts to uphold the sanctity of the trial by jury." We are satisfied that we would be usurping the functions of the jury if we were to hold that plaintiff was guilty of contributory negligence as a matter of law. We may add that defendants' counsel have made arguments in support of the instant contention that would be germane and proper if the contention involved a question as to the weight of the evidence.

The contention of defendants "that the accident was the result of plaintiff's conduct and not by reason of any wrongful or negligent driving on the part of the defendant Alfred F. Sautter," is without merit. Nor is there any merit in the further contention that "the plaintiff failed to prove that the defendant, Alfred F. Sautter, was the agent or servant of the defendants, Frank Budreck and Joseph Budreck or that he was acting within the scope of any employment for them. The court should have directed

case strenuously contended that under such a state of facts the plaintiff was guilty of contributory negligence as a matter of law, but the contention was not sustained, the court observing (p. 277): "The question of contributory negligence is one which is presumptively a fact for the consideration of a jury. It can not be defined in exact terms and unless it can be said that the action of a person is clearly and palpably negligent, it is not within the province of the court to substitute its judgment for that of a jury which is provided for the purpose of deciding this as well as the other questions in the case." The cases cited by defendants in support of their contention differ from the instant case upon the facts. One of the cases, which also by defendants is Tolan v. Wells, 224 Ill. 100, 40, but the decision in that case was reversed by the Supreme Court (240 Ill. 479, 481.) We are firm believers in the jury system and are in full accord with the rule stated by the Supreme Court in Pogel v. Sunderg, 251 Ill. 452, 456, that "the general rulings should be adopted not only by the trial courts but by the reviewing courts to uphold the sanctity of the trial by jury." We are satisfied that we would be usurping the functions of the jury if we were to hold that plaintiff was guilty of contributory negligence as a matter of law. We may add that defendants' counsel have made arguments in support of the instant contention that would be germane and proper if the contention involved a question as to the weight of the evidence.

The contention of defendants that the accident was the result of plaintiff's control and not by reason of any wrongful or negligent driving on the part of the defendant Alfred F. Sautter," is without merit. For is there any merit in the further contention that "the plaintiff failed to prove that the defendant, Alfred F. Sautter, was the agent or servant of the defendants, Frank Fudrock and Joseph Hanson or that he was acting within the scope of any employment for them. The court should have directed

a verdict as to the defendants, Frank and Joseph Budreck."

Defendants contend that the verdict is against the manifest weight of the evidence. After a careful consideration of all of the evidence we have been forced to the conclusion that the finding of the jury that plaintiff was not guilty of contributory negligence is against the manifest weight of the evidence and that the instant contention must be sustained.

As this case may be tried again we refrain from analyzing and commenting upon the evidence that bears upon the question as to whether or not plaintiff was guilty of contributory negligence.

The judgment of the Superior court of Cook county is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE
REMANDED FOR A NEW TRIAL.

Sullivan, P. J., and Friend, J., concur.

a verdict as to the defendants, Frank and Joseph Dufresne."

Defendants contend that the verdict is contrary to the manifest weight of the evidence. There is overall consideration of all of the evidence as have been forced to the conclusion that the finding of the jury that plaintiff's negligence of contributory negligence is against the manifest weight of the evidence and that the judgment accordingly must be reversed.

In this case they in their evidence relied from analyzing and commenting upon the evidence but have upon the question of the manner or not plaintiff's negligence of contributory negligence.

The judgment of the Superior Court of Cook County is reversed and the cause is remanded for a new trial.

Reversed and remanded for a new trial.

Gallivan, P. J., and Tebbs, J., concur.

43316

RAYMOND KOLL,
Appellant,
v.
NORMAN J. MITCHELL,
Appellee.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiff seeks to reverse a judgment in favor of defendant entered on the verdict of a jury in an action for personal injuries.

The gist of the complaint is that on September 18, 1941 defendant drove his automobile in an easterly direction on Rosemont Avenue across the intersection of Western Avenue in the City of Chicago; that defendant's automobile struck plaintiff as he was crossing Rosemont Avenue in a northerly direction at the crosswalk on the east side on Western Avenue; that defendant was guilty of negligence in (1) failing to give warning of the approach of his automobile; (2) in failing to give plaintiff the right of way. In his answer defendant avers that plaintiff was guilty of contributory negligence.

Facts necessary to an understanding of the case may be summarized as follows. At about 7:45 a. m. on the day of the occurrence, plaintiff, a mechanical engineer, left his home at 6244 Claremont Avenue, intending to board a southbound Western Avenue street car at the northwest corner of Western and Rosemont avenues. At its intersection with Western Avenue, Rosemont is an asphalt-paved street 30 feet in width. Western is about 100 feet wide with street car tracks in the center thereof. Plaintiff's residence was located one block east of Western and some distance south of Rosemont Avenue. On the southeast corner of the inter-

CASTE

TAICHONG KUOL,

Appellant,

v.

WOLKAN J. SIGVARLS,

Appellee.

APPEAL FROM

EXAMINER COURT

COOK COUNTY.

Mr. PRESIDING JUSTICE LEWIS DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiff seeks to reverse a judgment in favor of defendant entered on the verdict of a jury in an action for personal injuries.

The gist of the complaint is that on September 16, 1921 defendant drove his automobile in an easterly direction on Rosemont Avenue across the intersection of Western Avenue in the City of Chicago; that defendant's automobile struck plaintiff as he was crossing Rosemont Avenue in a northerly direction at the crosswalk on the east side of Western Avenue; that defendant was guilty of negligence in (1) failing to give warning of the approach of his automobile; (2) in failing to give plaintiff the right of way. In his answer defendant avers that plaintiff was guilty of contributory negligence.

Facts necessary to an understanding of the case may be summarized as follows. At about 7:45 a. m. on the day of the occurrence, plaintiff, a mechanical engineer, left his home at 6244 Glenwood Avenue, intending to board a southbound Western Avenue street car at the northwest corner of Western and Rosemont avenues. At the intersection with Western Avenue, Rosemont is an asphalt-paved street 30 feet in width. Western is about 100 feet wide with street car tracks in the center thereof. Plaintiff's residence was located southwest of Western and some distance south of Rosemont Avenue. On the northwest corner of the inter-

section was a building about 20 or 25 feet long facing Western Avenue; immediately back of it to the east was a vacant lot 75 or 100 feet long and extending south from the south sidewalk on Rosemont Avenue about 75 feet. Extending diagonally across this vacant lot was a footpath which commenced at the southeast corner of the lot and terminated at the south walk of Rosemont Avenue 8 or 10 feet east of the building on the southeast corner of the intersection. On the day of the accident plaintiff left his residence through the rear entrance, as was his custom, on his way to work. Following the path across the vacant lot, he reached the south walk of Rosemont Avenue a considerable distance east of the crosswalk on the east side of Western Avenue. Beyond this point the direction of plaintiff's course of travel is controverted.

There is also a conflict in the testimony as to the precise place in Rosemont Avenue, with reference to the crosswalk, plaintiff was struck by defendant's automobile.

Plaintiff's theory of the case is that he was struck by defendant's automobile as he was walking north across Rosemont Avenue on the east crosswalk at a point north of the center of the street. Defendant's theory is that plaintiff ran suddenly from behind an automobile parked at the south curb of Rosemont Avenue 30 or 40 feet east of Western Avenue into the right front fender of defendant's automobile as it was straddling the center of Rosemont Avenue.

Plaintiff's first contention is that the verdict is against the manifest weight of the evidence.

Plaintiff testified in substance that he was 50 years of age, totally blind in his left eye since childhood and at the time of the accident he suffered from granulated eyelids in his right eye; that when on leaving the diagonal footpath he came to the

section was a building about 50 or 60 feet long facing eastward (Avenue); immediately west of it to the west was a vacant lot 75 or 100 feet long and extending south from the south sidewalk on Dorchester Avenue about 75 feet. Extending diagonally across this vacant lot was a footpath which commenced at the northwest corner of the lot and terminated at the south walk of Dorchester Avenue 5 or 10 feet west of the building on the southeast corner of the intersection. On the day of the accident plaintiff left his residence bound for work, as was his custom, on his way to work. Following the path across the vacant lot, he reached the south side of Dorchester Avenue a considerable distance east of the crosswalk on the west side of Andrew Avenue. Beyond this point the direction of plaintiff's course of travel is controverted.

There is also a conflict in the testimony as to the precise place in Dorchester Avenue, with reference to the crosswalk, plaintiff was struck by defendant's automobile.

Plaintiff's theory of the case is that he was struck by defendant's automobile as he was trying to cross Dorchester Avenue on the shortest practicable to a point north of the corner of the street. Defendant's theory is that plaintiff ran suddenly from behind an autocar his course is the main route of travelled travel 30 or 40 feet east of Andrew Avenue into the right front fender of defendant's automobile as it was approaching the center of Dorchester Avenue.

Plaintiff's first proposition is that her verdict is against the manifest weight of the evidence.

Plaintiff testified in substance that he was 50 years of age, totally blind in his left eye since childhood and at the time of the accident he suffered from granulated eyelids in his right eye; that when on leaving the diagonal footpath he came to the

south walk of Rosemont Avenue he turned left, walking in a westerly direction to the east crosswalk of Western Avenue; that as he reached the east side of Western Avenue and faced north he looked to the east and then to the west; that he saw an automobile standing on the west side of the street (Western Avenue) near the crosswalk of Rosemont about the center of the street "possibly north of center"; that he started across the street "walking at normal speed"; that when he got to the center of the street he again looked to the east but "saw no traffic"; that as he proceeded three or four steps farther north, "I felt something hit me on the left side; there was no horn or signal; the automobile went 30 to 35 feet before it finally stopped." On cross-examination plaintiff testified that there were no marks in the center of Rosemont or marks defining the crosswalk; "when I got to the precise center of the street I looked east to be sure no traffic was coming west; I did not look west at all; I was looking a little to the west until I got to the center of the street, then I turned to look to the other side; the last time I saw the auto was when I stepped off the south curb and saw it still standing there; I did not look again to the west after I stepped off the curb; I didn't see the automobile until I was struck."

Edward Brieske, a police officer, testified that he came to the scene of the accident in response to a radio call; that he found the defendant's car 30 or 40 feet east of the east crosswalk of Western Avenue fairly close to the center line of Rosemont Avenue; that he observed glass strewn on the street at the east crosswalk just north of the center of the street, which extended a distance of 5 feet east of the crosswalk; that the

south walk of "Rosecourt Avenue he turned left", walking in a westerly direction to the west crossewalk of Eastern Avenue; that he thought the exact color of Eastern Avenue and faced north he looked to the east and then to the west; that he saw an automobile standing on the west side of the street (Eastern Avenue) near the crossewalk of Rosecourt about the center of the street "possibly north of center"; that he started across the street "walking at normal speed"; that when he got to the center of the street he again looked to the east but "saw no traffic"; that he proceeded three or four steps further north, "I felt something hit me on the left side; there was no horn or signal; the automobile went 30 to 35 feet before it finally stopped."

On cross-examination plaintiff testified that there were no marks in the center of Rosecourt or marks defining the crossewalk; "when I got to the pavement center of the street I looked east to be sure no traffic was coming west; I did not look west at all; I was looking a little to the west until I got to the center of the street, then I turned to look to the north side; the last time I saw the auto was when I stepped off the south curb and saw it still standing there; I did not look again to the west after I stepped off the curb; I didn't see the automobile until I was struck."

Edward Dineske, a police officer, testified that he came to the scene of the accident in response to a radio call; that he found the defendant's car 30 or 40 feet east of the east crossewalk of Eastern Avenue fairly close to the center line of Rosecourt Avenue; that he observed skid marks on the street at the east crossewalk just north of the center of the street, which extended a distance of 8 feet east of the crossewalk; that the

right front headlight of defendant's automobile was broken; that "there were skid marks east of the headlight glass, starting about 3 or 4 feet east of the end of the glass, that would be approximately 8 feet east of the crosswalk."

Officer Dennis McDonough, who accompanied Officer Brieske to the scene of the accident, testified that the defendant's automobile was standing 30 or 40 feet east of the crosswalk; "the glass started just east of the east crosswalk and was scattered over the street 10 feet or so; it commenced at the crosswalk; the skid marks were 10 or 12 feet long; the skid marks started 5 to 10 feet east of the crosswalk and extended 10 feet; the glass commenced 2 or 3 feet east of the east crosswalk; it was scattered all around there on the south and north side; I think there were one or two cars parked on the south side of Rosemont east of Western Avenue, maybe 15 or 20 feet east of the crosswalk; we parked our car along the south curb; there was a car in front of us."

Officer Brieske, recalled, in behalf of the plaintiff, testified, "When I came to the scene of the accident there were no cars parked on the south side of Rosemont east of Western Avenue facing east." On cross-examination, Officer Brieske testified, "The glass was not scattered on both sides of the street; it was all east of the east sidewalk and continued in one straight line east; the glass started 15 to 17 feet east of the east curb; there was no auto parked in front of us on the south side of Rosemont Avenue."

Plaintiff's counsel read a statement made by the defendant to the police in which he said he was driving about 15 miles an hour at the time of the accident; that the pavement was good and the street was dry; "there was a blinding sun; I had the sun visor

right front headlight of defendant's automobile was broken; that "there were mud marks east of the headlight glass, starting about 3 or 4 feet west of the end of the glass, that would be approximately 2 feet east of the crosswalk."

Officer Dennis Kolkenbeck, who accompanied Officer Grieves to the scene of the accident, testified that the defendant's automobile was standing 30 or 40 feet east of the crosswalk; "the glass started just east of the east crosswalk and was scattered over the street 10 feet or so; it commenced at the crosswalk; the mud marks were 10 or 12 feet long; the mud marks started 3 to 10 feet east of the crosswalk and extended 10 feet; the glass commenced 2 or 3 feet west of the west crosswalk; it was scattered all around there on the south and north side; I think there were one or two cars parked on the south side of Rosemont east of Western Avenue, maybe 15 or 20 feet east of the crosswalk; we parked our car along the south curb; there was a car in front of us."

Officer Grieves, testifying, in behalf of the plaintiff, testified, "When I came to the scene of the accident there were no cars parked on the south side of Rosemont east of Western Avenue facing east." On cross-examination, Officer Grieves testified, "The glass was not scattered on both sides of the street; it was all east of the west crosswalk and continued in one straight line east; the glass started 10 to 12 feet east of the east curb; there was no auto parked in front of us on the south side of Rosemont Avenue."

Plaintiff's counsel read a statement made by the defendant to the police in which he said he was driving about 15 miles an hour at the time of the accident; that the pavement was good and the street was dry; "there was a blinding sun; I had the sun visor

down and sun glasses on and didn't see a pedestrian crossing, and the right front headlight of my car struck him; I didn't see him until the bump; the car traveled 10 feet after the accident; there were no automobiles on the street at the time of the accident."

Three witnesses testified in behalf of the defendant: Ralph Brown Walters; Axel Liden; and the defendant. Walters, testifying by deposition, stated that he knew neither of the parties; that on the day of the accident he was on the west side of Western Avenue and north of Rosemont about 125 feet, walking south, "when I heard the thud"; I noticed some gentleman picking up another gentleman in the street right in front of the automobile in Rosemont Avenue about 50 feet east of the easterly curb line of Western Avenue; the rear of the car was 50 feet or more from the easterly curb of Western Avenue; I saw skid marks 3 or 4 feet long running parallel and in the rear of the car; the left front wheels were just about the center of the street; the bulk of the glass was underneath the car; you could hardly see at all looking into the sun as you proceeded east across Western Avenue; the left wheel was six inches or a foot over the center line."

Liden testified that he had a newspapar stand at the northwest corner of Rosemont and Western; "At the time, I was standing in front of the news stand facing east; my news stand is 12 or 15 feet west of the west curb and about 4 feet north; the man (plaintiff) came back from the alley; there was a car parked on the south side by the chicken house; this man ran right in front of that car and out to the street and that is when the accident occurred; he was not walking, he was running; the front of the car was parked about 25 feet east of the crosswalk; I saw Mitchell's car all the way; he crossed slanting to get on the

down and sun glares on and didn't see a pedestrian crossing, and the right front headlight of my car struck him; I didn't see him until the bump; the car travelled 10 feet after the accident; there were no automobiles on the street at the time of the accident."

There witnesses testified in behalf of the defendant:

Ralph Irvin Slattery; Carl Lidon; and the defendant. Slattery, testifying by deposition, stated that he knew neither of the parties; that on the day of the accident he was on the west side of Western Avenue and north of Fremont about 1:15 P.M., waiting, said, "when I heard the thump"; I noticed some gentleman dashing across another gentleman in the street right in front of the automobile in Fremont street about 40 feet east of the crossing; such line of Western Avenue; the rear of the car was 10 feet or more from the easterly curb of Western Avenue; I saw skid marks 3 or 4 feet long running parallel and in the rear of the car; the left front wheels were just about the center of the street; the bulk of the glass was underneath the car; you could easily see at all looking into the car as you crossed east across Western Avenue; the left wheel was six inches or a foot over the center line."

Lidon testified that he had a newspaper stand at the northwest corner of Fremont and Western; "At the time, I was standing in front of the news stand facing east; my news stand is 12 or 15 feet west of the west curb and about 4 feet north; the man (plaintiff) came out from the alley; there was a car parked on the south side by the chicken house; this man ran right in front of that car and out to the street and that is when the accident occurred; he was not walking, he was running; the front of the car was parked about 25 feet east of the crosswalk; I saw Mitchell's car all the way; he crossed planning to get on the

right side, at an angle; he stopped just in front of the car; he just went 5 or 6 feet after he collided with plaintiff; the injured man was not at any time on the east crosswalk; it happened 30 or 35 feet east of the crosswalk."

Defendant testified that he parked his car on the northwest corner of the intersection to purchase a newspaper; "I cut diagonally across the street; about 10 feet east of the crosswalk there was an impact; there was an auto parked 10 or 15 feet from the east crosswalk; at the time of the impact my car was just a foot or two ahead of the parked car farther east; when my car came to a stop after the accident the rear end was 15 or 20 feet east of the east crosswalk; I was straddling the middle of the road."

The law is well established that each party has a right to have a jury instructed upon his theory of the case if it has a basis upon which to rest. (Chicago Union Traction Co. v. Browdy, 206 Ill. 615-623; Fessenden v. Doane, 188 Ill. 228, 231.)

In the instant case there is evidence which supports defendant's theory that plaintiff emerged suddenly, from behind an automobile parked at the south curb of Rosemont Avenue, a considerable distance east of the crosswalk, and that the impact occurred at this point.

The probative value of evidence and the conclusions to be drawn from it lies within the province of the jury and this court is without authority to weigh the evidence. (Jones v. Esenberg, 299 Ill. App. 551; Mueth v. Jaska, 302 Ill. App. 289, 294; Philpott v. Parham, 316 Ill. App. 278, 281.) In our view, the evidence was ample to warrant the verdict of the jury and we are therefore not disposed to hold that it was against the manifest weight of the evidence.

right side, of course; he stopped just in front of the jury; he just went 5 or 6 feet after he collided with plaintiff; the injured man was out of any time on the west crossing; it happened 30 or 35 feet east of the crossing."

Defendant testified that immediately his car was in the northwest corner of the intersection he turned a somersault; "I put disconnectly across the street; about 15 feet east of the crossing there was an impact; there never was another 10 or 15 feet from the west crossing; at the time of the impact my car was just a foot or two ahead of the curbed car further east; then my car came to a stop sideways southwest the road and was 15 or 20 feet east of the west crossing; I was straddling the middle of the road."

The law is well established that such evidence has a right to have a jury instructed upon its theory of the case if it has a basis upon which it rest. (Gulf, Colo. & Santa Fe R. v. McGown, 208 Ill. 320-324; Lawrence v. Duncan, 68 Ill. App. 271.)

In the instant case there is evidence which corroborates defendant's theory that initially caused a collision, the turning of automobile caused at the west side of Sheridan Road, a considerable distance east of the crossing, and that the impact occurred at this point.

The probative value of evidence and the conclusions to be drawn from it lies within the province of the jury and this court is without authority to weigh the evidence. (Lopez v. Lundgren, 290 Ill. App. 574; Martin v. Lewis, 200 Ill. App. 528, 534; Hallmark v. Perkins, 252 Ill. App. 275, 282.) In our view, the evidence was ample to warrant the verdict of the jury and we are therefore not disposed to hold that it was contrary to the sufficient weight of the evidence.

Plaintiff insists that the court also erred in giving two instructions at the request of the defendant. The objections as stated in his brief at pages 23 and 24 are, in substance, that these instructions failed to consider the fact that the plaintiff was on a crosswalk or was within the sphere protected by law even if he was not wholly within the unmarked crosswalk, and that the defendant struck the plaintiff while in the north half of the road (Rosemont Avenue). In support of his position plaintiff relies on the recent case of Moran v. Gatz, 390 Ill. 478, which involved the construction of the right-of-way statute, Ill. Rev. Stats. 1943, ch. 95½, sec. 171. There the plaintiff was injured while on a crosswalk and that fact was not controverted. Because of the dissimilarity of the facts, we do not think that the Moran case is sufficiently akin to the case at bar to make it controlling. We think the court was justified in giving the instructions complained of and that they correctly stated the law governing the case.

Plaintiff contends that the verdict was the result of improper remarks of counsel for the defendant. It appears that defendant's counsel, during cross-examination of plaintiff's witness Brieske, had before him what purported to be a copy of a police report and so stated to the witness. He then propounded the following questions: "You have been sworn here, have you?" "I notice in answer to question six that there is a cross-mark where it says with reference to what the pedestrian was going; when did you put that on?" The witness replied: "At the time I made the report out." Immediately thereafter, counsel made the following statement: "Well, here is one I have from the police department, and I call your attention to the fact that it is not on that." The court sustained an objection

Plaintiff insists that the court also erred in giving two instructions at the request of the defendant. The objections as stated in his brief at pages 22 and 23 are, in substance, that these instructions failed to consider the fact that the plaintiff was on a crosswalk or was within the marks established by law even if he was not wholly within the marked crosswalk, and that the defendant struck the plaintiff while in the north half of the road (Crescent Avenue). In support of his position reliance is placed on the recent case of Carey v. Dahl, 200 Ill. App. 373, which involved the construction of the right-of-way statute, Ill. Rev. Stats. 1923, ch. 95½, sec. 172. There the plaintiff was injured while on a crosswalk and that fact was not controverted. However of the distinctivity of the facts, we do not think that the same case is sufficiently akin to the case at bar to make it controlling. We think the court was justified in giving the instructions complained of and that they correctly stated the law governing the case.

Plaintiff contends that the verdict was the result of improper remarks of counsel for the defendant. It appears that defendant's counsel, during cross-examination of plaintiff's witness Fitzsche, had before him what purported to be a copy of a police report and so stated to the witness. He then propounded the following questions: "You have been sworn here, have you?" "I refuse to answer to question via that there is a cross-[illegible] report." "Is reference to what the policeman was going; when did you put that on?" The witness replied: "At the time I made the report out." Immediately thereafter, counsel made the following statement: "Well, here is one I have from the police department, and I call your attention to the fact that it is not on that." The court instructed on objection

to the use of the alleged copy by defendant's counsel. Plaintiff argues that this was done, "with the idea of discrediting the officer in the eyes of the jury and implying that he had falsified the report." It appears that defendant's counsel made no objection to the introduction in evidence by plaintiff of the original report (Rec. p. 148); nor did the trial court preclude plaintiff's counsel from clarifying the discrepancy in the report.

Plaintiff also complains that defendant's counsel read to the jury certain portions of witness Walters' deposition relating to some person who, claiming to be a representative of plaintiff's attorney, interviewed the witness and that the questions and answers so read, as well as certain remarks of defendant's counsel and by the trial court, materially prejudiced the plaintiff's cause in the eyes of the jury. Upon a careful reading of the record it appears that the trial court struck out parts of Walters' deposition and instructed the jury to disregard it, thus in our opinion removing any danger of prejudicing the jury. Although some of the remarks of defendant's counsel and the court's comment complained of may be subject to criticism, we do not think they are of such a character as to warrant a reversal of the judgment.

For the reasons given the judgment is affirmed.

JUDGMENT AFFIRMED.

KILEY AND BURKE, JJ. CONCUR.

to the use of the alleged copy by defendant's counsel. Plaintiff argues that this was done, "with the idea of discredited the officer in the eyes of the jury and implying that he had falsified the report." It appears that defendant's counsel made no objection to the introduction in evidence or validity of the original report (Rec. p. 149); nor did the trial court preclude plaintiff's counsel from identifying the discrepancy in the report.

Plaintiff also complains that defendant's counsel read to the jury certain portions of witness Watters' cross-examination relating to some person who, claiming to be a representative of plaintiff's attorney, interviewed the witness and that the questions and answers so read, as well as certain remarks of defendant's counsel and by the trial court, materially prejudiced the plaintiff's cause in the eyes of the jury. Upon a careful reading of the record it appears that the trial court strove out parts of Watters' deposition and instructed the jury to disregard it, thus in our opinion removing any danger of prejudicing the jury. Although some of the remarks of defendant's counsel and the court's comment complained of may be subject to criticism, we do not think they are of such a character as to warrant a reversal of the judgment.

For the reasons given the judgment is affirmed.

Judgment affirmed.

GILLY AND GRAY, JJ., CONCUR.

43423

MAE SULLIVAN, Administratrix of the Estate of ROBERT C. SULLIVAN, deceased,	)	APPEAL FROM
Appellant,	)	
v.	)	SUPERIOR COURT
UNION TRANSFER COMPANY OF OMAHA, a corporation,	)	
Appellee.	)	COOK COUNTY.

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment in favor of defendant entered on the verdict of a jury in a suit brought under the Injuries Act to recover damages resulting from the wrongful death of plaintiff's intestate Robert C. Sullivan.

Late in the afternoon on December 31, 1942, Robert Sullivan, aged 15½ years, and Helmer Claesson, his companion aged 14 years, were riding their bicycles north on Ashland Avenue in the City of Chicago. At 74th Street, Ashland Avenue is 66½ feet wide with street car tracks running in the center thereof. A short distance north of 74th Street a railroad viaduct 95½ feet wide passes over Ashland Avenue, and at this point the pavement of Ashland Avenue narrows to 46 feet. Underneath the viaduct, in the center of the highway, are nine steel supporting pillars. The northbound street car rails lie east of the steel pillars and the distance between the east rail of the northbound street car tracks and the east curb of Ashland Avenue is 13 feet 3 inches. There is also a row of similar pillars one foot east of the east curb of Ashland Avenue, the first three of which are spaced 12 feet apart.

MAE BURLING, administratrix of the estate of ROBERT E. BURLING, deceased,	
Appellees,	
v.	
UNION INDEMNITY COMPANY OF UTICA, a corporation,	
Appellee.	

Appellant, Pro

Appellee Pro

Date Decided.

3 0 C t. 1 9 3 8

Mr. Justice Wilkin delivered the opinion of the court.

Plaintiff appeals from a judgment in favor of defendant entered on the verdict of a jury in a suit brought under the injuries act to recover damages resulting from the wrongful death of plaintiff's intestate Robert E. Burling.

Late in the afternoon on December 2, 1936, Robert Burling, aged 18 years, and Oliver Lassen, his companion aged 17 years, were riding their bicycles north on Ashland Avenue in the city of Chicago. At 71th street, Ashland Avenue is 68 feet wide with street car tracks running in the center thereof. A short distance north of 71th street a railroad viaduct 38 feet wide passes over Ashland Avenue, and at this point the pavement of Ashland Avenue narrows to 41 feet. Underneath the viaduct, in the center of the highway, are nine steel supporting pillars. The northbound street car tracks lie east of the steel pillars and the distance between the east rail of the northbound street car tracks and the east curb of Ashland Avenue is 15 feet 3 inches. There is also a row of similar pillars one foot east of the east curb of Ashland Avenue, the first three of which are spaced 15 feet apart.

As Robert Sullivan and his companion Claesson neared the viaduct they were riding abreast. Upon reaching the place where the highway converged at the viaduct, Robert Sullivan rode ahead, leaving Claesson about an automobile length behind. When Robert Sullivan reached a point under the viaduct somewhere between the second and third pillars near the east curb of Ashland Avenue he came opposite the right rear dual wheels of the defendant's truck, which was proceeding north while straddling the east rail of the northbound street car tracks. While the truck and bicycle were in this position the outer right rear tire of defendant's truck blew out. At that moment Robert Sullivan appeared to lose control of his bicycle, it swerved and struck the curb, causing him to be catapulted over the handlebars. The injuries suffered from the fall resulted in his death. The accident happened about 4:30 p.m.. The weather was clear and the visibility under the viaduct was good.

Plaintiff's contention is that the verdict is against the manifest weight of the evidence.

There were three occurrence witnesses: Helmer Claesson, Bernard Tarka the truck driver, and Loretta Sommers. Helmer Claesson, called as a witness in behalf of the plaintiff, testified substantially as follows: That he and the deceased rode alongside of each other up to the viaduct at the rate of 10 or 15 miles an hour. "Bobby was about the length of an auto ahead of me as I hit the tunnel. I saw the truck just before we came to the viaduct. As I was about to enter, the truck came and passed me. There was a kind of a blowout or noise. Just as I looked up I seen something flying in the air. I did not notice what happened to him. I did not see any part of the truck strike him. When we entered the

As Robert Sullivan and his companion Clarence Hansen neared the viaduct they were riding abreast. Upon reaching the place where the highway converged at the viaduct, Robert Sullivan rode ahead, leaving Clarence Hansen about an automobile length behind. When Robert Sullivan reached a point under the viaduct somewhere between the second and third pillars near the east curb of Kinland Avenue he came opposite the right rear dual wheels of the defendant's truck, which was proceeding north while straddling the east rail of the northbound street car tracks. While the truck and bicycle were in this position the outer right rear tire of defendant's truck blew out. At that moment Robert Sullivan appeared to lose control of his bicycle, it swerved and struck the curb, causing him to be catapulted over the handlebars. The injuries suffered from the fall resulted in his death. The accident happened about 4:30 p.m.. The weather was clear and the visibility under the viaduct was good.

Plaintiff's contention is that the verdict is against the manifest weight of the evidence.

There were three occurrence witnesses: Lefter Clarkson, Bernard Yates the truck driver, and Lorette Lowery. Lefter Clarkson, called as a witness in behalf of the plaintiff, testified substantially as follows: That he and the deceased rode alongside of each other up to the viaduct at the rate of 10 or 12 miles an hour. "Nobody was about the length of an auto ahead of me as I hit the tunnel. I saw the truck just before we came to the viaduct. As I was about to enter, the truck came and passed me. There was a kind of a blowout or noise. Just as I looked up I seen something flying in the air. I did not notice what happened to him. I did not see any part of the truck strike him. When we entered the

underpass, Bobby was about 2 feet away from the curb and the left wheel of the truck was straddling the street car track. The distance between the truck and Robert would be about 2½ or 3 feet. Robert fell between the second and third pillar. I saw him fall over the handlebars. The truck was close to him, maybe a little over a foot. The truck did not careen but continued on a straight course."

Bernard Tarka, called as a witness in behalf of the plaintiff, testified that he was driving a 1935 International 2 - or 3-ton truck which had a 12-foot body and was 7 feet wide. It had dual rear wheels and retreaded tires. At the time he was hauling 3500 pounds of merchandise consisting of iron castings and wooden cases; that he heard a report underneath the viaduct but did not know what it was and proceeded north about 100 or 150 feet before stopping. When he looked at the tires he observed that the outer right rear tire was flat; that he purchased the truck about a month before the accident in question and had used it about five times. When he purchased the truck he did not know that there was a boot in the outer rear tire and that nobody had told him of it; that the day before the accident he checked the pressure on the tires and inspected them for defects by running his hands around the tires but observed no cuts or holes; he maintained 90 pounds of pressure in each of the dual tires; that his truck had gone about 10 feet into the viaduct when he heard the sound but proceeded straight ahead; that the other right rear tire carried the load; that the right side of his truck was about 6½ or 7 feet from the east curb as he drove under the viaduct; that he did not see the deceased at any time prior to the blowout and had no intimation that anything had happened.

underneath, Bobby was about 3 feet away from the curb and the left wheel of the truck was straddling the street car track. The distance between the truck and Robert would be about 2½ or 3 feet. Robert fell between the second and third pillar. I saw him fall over the handlebars. The truck was close to him, maybe a little over a foot. The truck did not corner but continued on a straight course."

Bernard Lerch, called as a witness in behalf of the plaintiff, testified that he was driving a 1925 International 2 - or 3-ton truck which had a 14-foot body and was 7 feet wide. It had dual rear wheels and pneumatic tires. At the time he was hauling 3800 pounds of merchandise consisting of iron castings and wooden cases; that he heard a report underneath the viaduct but did not know what it was and proceeded north about 100 or 150 feet before stopping. When he looked at the tires he observed that the outer right rear tire was flat; that he backed the truck about a month before the accident in question and had used it about five times. When he purchased the truck he did not know that there was a boot in the outer rear tire and that nobody had told him of it; that the day before the accident he checked the pressure on the tires and inspected them for defects by rubbing his hands around the tires but observed no cuts or holes; he maintained 90 pounds of pressure in each of the dual tires; that his truck had gone about 10 feet into the viaduct when he heard the sound but proceeded straight ahead; that the other right rear tire carried the load; that the right side of his truck was about 8½ or 7 feet from the east curb as he drove under the viaduct; that he did not see the deceased at any time prior to the blowout and had no intimation that anything had happened.

Mrs. Loretta Sommers testified that she was riding as a passenger in an automobile which was approximately 25 feet behind the defendant's truck. Shortly before the occurrence she observed the deceased and Claesson riding side by side about 30 feet south of the viaduct and that the truck was straddling the east rail 7 or 8 feet from the curb. When the deceased and Claesson reached the viaduct they "went single file." They rode as far as the second pillar right behind the truck "and we heard a noise like a blowout * * * the bicycle swerved, hit the curb, and the deceased went over the handlebars and fell into the street. At the time of the blowout the deceased was 3 feet away from the side of the truck. He was at the end of the truck. No part of the truck struck the handlebars."

Frank M. Hanson and John Naddy, police officers testified that they were members of the Accident Prevention Bureau and came to the scene of the accident about five o'clock p.m. They found the defendant's truck parked about a hundred feet north of the viaduct. Thereafter they tested the brakes and found them functioning properly. Officer Hanson observed a puncture on the face of the outer right dual tire. Both officers testified that a fresh scrape mark 2 feet long appeared on the rub rail which is about six inches above the rear wheels on the right side of the truck.

Edward J. Koudelka, a conservation engineer for a tire company, testifying in behalf of plaintiff, said that the blowout was caused by a boot in the tire after it had been cut and therefore was not safe for use.

Harold Greenwood, manager of a Goodyear tire service branch, called in behalf of defendant, testified in substance

Mrs. Loretta Somers testified that she was riding as a passenger in an automobile which was approximately 25 feet behind the defendant's truck. Shortly before the occurrence she observed the deceased and Clawson riding side by side about 50 feet south of the viaduct and that the truck was straddling the east rail 7 or 8 feet from the curb. When the deceased and Clawson reached the viaduct they "went single file." They rode as far as the second pillar right beside the truck "and we heard a noise like a blowout ... the bicycle swerved, hit the curb, and the deceased went over the handlebars and fell into the street. At the time of the blowout the deceased was 5 feet away from the side of the truck. He was at the end of the truck. No part of the truck struck the handlebars."

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Harold Greenwood, manager of a Goodyear tire service branch, called in behalf of defendant, testified in substance

that except for a blowout in the tire it was in exceptionally good shape, and that the puncture was caused by a bruise such as striking a "chuck hole or a rock"; that the tube was also in good condition.

Examination of the record discloses that expert witnesses testified in great detail about the condition of the tire which blew out and as to whether it was safe for use on the day of the occurrence. To relate the conflicting evidence of these witnesses would unduly extend this opinion.

In his brief plaintiff's counsel maintains that there is a hiatus in the evidence as to what occurred immediately after the blowout of the rear tire of defendant's truck and that during this short interval the deceased, startled by the loud noise of the blowout reverberating under the viaduct, was caused to lose his balance and veer against the side of the truck, or that the truck swerved to the right against the deceased's bicycle. The foregoing testimony of the occurrence witnesses does not support plaintiff's theory, nor can we say that any conclusions drawn from circumstances such as the damage to the bicycle, the scrape mark on the rub rail of the truck, the condition of the defective tire, and the distance between the east curb and the right side of defendant's truck at the time of the occurrence, must prevail over the oral testimony of three witnesses who stated that there was no physical contact between the deceased's bicycle and the truck. The determination of the probative value of evidence and the conclusions to be drawn from it lies in the hands of the jury. This court cannot weigh the evidence. (Philpott v. Parham, 316 Ill. App. 278-281.) From a careful reading of the record we think the evidence amply justifies the finding of the jury.

that except for a blowout in the tire it was in exceptionally good shape, and that the punctures are caused by a brute such as striking a "sunk hole or a rock"; that the tube was also in good condition.

Examination of the record discloses that expert witnesses testified in great detail about the condition of the tire which blew out and as to whether it was safe for use on the day of the occurrence. To relate the conflicting evidence of these witnesses would unduly extend this opinion.

In his brief plaintiff's counsel maintains that there is a hiatus in the evidence as to what occurred immediately after the blowout of the rear tire of defendant's truck and that during this short interval the deceased, startled by the loud noise of the blowout revolvertiny under the window, was caused to lose his balance and veer against the side of the truck, or that the truck swerved to the right against the deceased's bicycle. The foregoing testimony of the occurrence witnesses does not support plaintiff's theory, nor can we say that any conclusions drawn from circumstances such as the damage to the bicycle, the scrape mark on the rub rail of the truck, the condition of the effective tire, and the distance between the east curb and the right side of defendant's truck at the time of the occurrence, must prevail over the oral testimony of three witnesses who stated that there was no physical contact between the deceased's bicycle and the truck. The determination of the probative value of evidence and the conclusions to be drawn from it lies in the hands of the jury. This court cannot weigh the evidence. (Philpott v. Parham, 216 Ill. App. 276-281.) From a careful reading of the record we think the evidence amply justifies the finding of the jury.

Finally plaintiff contends that the court erred in giving instruction number 3, since no one saw precisely how the accident happened. Here plaintiff's counsel again bases his argument on conclusions drawn from certain physical facts, on the theory that they outweigh the oral testimony of witnesses who stated positively that there was no collision between the defendant's truck and the decedent.

The law is well established that each party has a right to have a jury instructed upon his theory of the case if it has a basis upon which to rest. (Chicago Union Traction Co. v. Browdy, 206 Ill. 615-623; Fessenden v. Doane, 188 Ill. 228, 231.)

In view of the defendant's evidence, which supports its theory of the case, we think the plaintiff's objection to the instruction complained of is untenable. We have examined all the instructions and in our opinion they accurately and fully state the law governing the case at bar.

For the reasons stated, the judgment is affirmed.

JUDGMENT AFFIRMED.

KILEY AND BURKE, JJ. CONCUR.

Finally plaintiff contends that the court erred in giving instruction number 3, since no one saw precisely how the accident happened. Here plaintiff's counsel again bases his argument on conclusions drawn from certain physical facts, on the theory that they outweigh the oral testimony of witnesses who stated positively that there was no collision between the defendant's truck and the deceased.

The law is well established that each party has a right to have a jury instructed upon his theory of the case if it has a basis upon which to rest. (Chicago Union Traction Co. v. Fredrickson, 208 Ill. 613-622; Fredrickson v. Deane, 188 Ill. 588, 591.)

In view of the defendant's evidence, which supports its theory of the case, we think the plaintiff's objection to the instruction complained of is untenable. We have examined all the instructions and in our opinion they accurately and fully state the law governing the case at bar.

For the reasons stated, the judgment is affirmed.

JUDGMENT AFFIRMED.

KILEY AND BURKE, JJ., CONCUR.

43587

DAVID S. JENSEN, Appellee, v. THE BALTIMORE & OHIO RAILROAD COMPANY, a corporation, Appellant.	)	APPEAL FROM SUPERIOR COURT COOK COUNTY.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

David S. Jensen filed an amended complaint in the Superior Court of Cook County against The Baltimore & Ohio Railroad Company, alleging that on April 26, 1943 the Bates & Rogers Construction Company contracted with the defendant to construct and install drains underneath its roadbed and tracks in the vicinity of Cincinnati, Ohio; that he was the foreman employed by the construction company; that in the performance of his duties it was necessary for him to be about, upon and between the tracks of defendant, and to cross from one side to the other; that on that afternoon, while he was so in the performance of his duty and while in the exercise of due care for his own safety, defendant's eastbound freight train was negligently caused to run into and over him, and as a result thereof he was injured. He asked judgment for $200,000. After the court, on motion of plaintiff, eliminated certain charges of negligence, the amended complaint alleged the following particulars of negligence: 1. Defendant operated its freight train at excessive speed. 2. Defendant failed to have the freight train under proper control. 3. Defendant failed to properly reduce speed where the work was being done. 4. Defendant failed to give adequate warning of approach of train by bell, whistle or other signal device. 5. Defendant failed to keep a proper lookout. 6. Defendant failed to have its flagman

[illegible]

DAVID E. [illegible],

Appellee,

v.

THE BALTIMORE & OHIO RAILROAD COMPANY, a corporation,

Appellant.

Appeal from

Superior Court

of Cuyahoga County.

[illegible], Judge.

[illegible]. Judgment affirmed on condition or for costs.

David E. [illegible] filed in Common Pleas Court in the Superior Court of this county against the Baltimore & Ohio Railroad Company, alleging that on April 30, 1943 the latter's Toledo Construction Company contracted with the defendant to construct and install grains underneath the roadbed and tracks in the vicinity of Cleveland, Ohio; that he was the foreman employed by the construction company; that in the performance of his duties it was necessary for him to be absent, near and between the tracks of defendant, and to cross from one side to the other; that on that occasion, while he was in the performance of his duty and while in the exercise of due care for his own safety, defendant's construction freight train was negligently caused to run into and over him, and as a result thereof he was injured. He asked judgment for [illegible]. After the court, on motion of plaintiff, eliminated certain charges of negligence, the remaining complaint alleged the following particulars of negligence: 1. Defendant operated its freight train at excessive speed. 2. Defendant failed to have the freight train under proper control. 3. Defendant failed to properly remove weed where the work was being done. 4. Defendant failed to give adequate warning of approach of train by bell, whistle or other signal device. 5. Defendant failed to keep a proper lookout. 6. Defendant failed to have its flagman

stationed in a proper position a sufficient distance west of the point of the occurrence. In its answer defendant denied each and all allegations of negligence; averred that the construction work was being performed by the construction company as an independent contractor and that plaintiff was their employee; and denied that plaintiff was in the exercise of ordinary care and caution for his own safety. A trial before the court and a jury resulted in a verdict of $58,000. Defendant's motions for a directed verdict, for judgment notwithstanding the verdict and in the alternative for a new trial, were overruled. On remittitur of $8,000 judgment was entered for $50,000. This appeal followed.

The mishap occurred at about 3: 45 p.m. on Monday, April 26, 1943 on the main line tracks of defendant at a point west of Cincinnati, Ohio. Defendant had employed the Bates & Rogers Company to install a drainage system to remove mud and water underneath its main line tracks. Both eastbound and westbound main line tracks were located on the north bank of the Ohio River. The tracks were sinking into the river and the project was an important and urgent one which had to be done quickly. About 800 feet west of the place of the occurrence there is an overhead viaduct which extends northerly and southerly. The viaduct is part of Lower River Road. The main line tracks extend east and west under the viaduct. The one here involved was the eastbound main, known as track #2, which would be the most southerly track and the closest to the river bank. Adjacent to it and to the north with 9.6 feet between them, was defendant's westbound track, known as track #1. About 300 feet east of the viaduct the tracks curve to the north. The curve is fairly sharp and was 750 feet in length. The mishap occurred on the center of this curve. There was evidence that

stationed in a proper position a sufficient distance west of the point of the occurrence. In its answer defendant denied each and all allegations of negligence; averred that the construction work was being performed by the construction company as an independent contractor and that plaintiff was their employee; and denied that plaintiff was in the exercise of ordinary care and caution for his own safety. A trial before the court and a jury resulted in a verdict of $8,000. Defendant's motions for a directed verdict, for judgment notwithstanding the verdict and in the alternative for a new trial, were overruled. On remittitur of $8,000 judgment was entered for $30,000. This appeal follows.

The mishap occurred at about 3:45 p.m. on Monday, April 26, 1943 on the main line track of defendant at a point west of Ottawa, Ohio. Defendant had employed the Lopez Construction Company to install a drainage system to remove rain and water underneath its main line tracks. Both eastbound and westbound main line tracks were located on the north bank of the Ohio River. The tracks were sinking into the river and the project was an important and urgent one which had to be done quickly. About 600 feet west of the place of the occurrence there is an overhead viaduct which extends northerly and southerly. The viaduct is part of lower River road. The main line tracks extend east and west under the viaduct. The one here involved was the eastbound main, known as track #5, which would be the most southerly track and the closest to the river bank. Adjacent to it and to the north with 6.6 feet between them, was defendant's westbound track, known as track #1. About 300 feet east of the viaduct the tracks curve to the north. The curve is fairly sharp and was 750 feet in length. The mishap occurred on the center of this curve. There was evidence that

under the viaduct it is dark and that there are shadows when the sun is shining in the west. Immediately north of the main line tracks of defendant, there were two main line tracks of the New York Central (Big Four), at a distance of 21.5 feet. Immediately to the north of the New York Central tracks there were three or four switch tracks. All during the progress of the work these tracks were being used by freight and passenger trains. Trains were operating over these tracks practically all day long every two or three minutes. There were switch engines immediately to the north, switching cars and bumping cars and shunting them into a large Big Four yard which commenced at the viaduct. The place was a very noisy one. There were bells and whistles and the noise of bumping cars and switching movements all day long. In addition to these noises an air hammer was in operation at the time of the occurrence, and for a distance of 200 feet this made a great deal of noise which interfered with hearing.

For several weeks a group of workmen employed by the contractor had been on the tracks and men were walking back and forth across them continually. Plaintiff was a foreman for the contractor. He had mining experience, also experience in other underground work and in carpentry. The west well for drainage purposes was being put down at the time of the occurrence, at a point 813.6 feet east of the viaduct. The well sinking work was going on between defendant's westbound track (#1) and the New York Central track to the north at about the time of the occurrence. During a period of two or three weeks before the mishap, two pits, or shafts, had been dug immediately north of the northerly rail of the defendant's westbound main line track. Plaintiff's crew worked from 8 in the morning until 4:30 in the afternoon. About 30 or 40 minutes before quitting time, plaintiff would commence to shut down operations because by quitting time the men had to be ready to leave, and the instructions were that everything had to

under the viaduct by the park and that there are bridges over the
ave in sliding in the west. Immediately north of the main line
tracks of Lefrancois', there are two main line tracks of the New
York Central (Nic Tuer), on a diagonal to Lake. Immediately
to the north of the New York Central tracks there were three or
four switch tracks. All during the progress of the work these
tracks were being used by trains of all descriptions trains. Trains
were pulling over these tracks, shunting all the long every
two or three minutes. There were water tanks immediately to
the north, switching cars and heating cars and shuttling them
into a large big iron yard which commences at the viaduct. The
place was a very busy one. There were cars for switching and the
noise of shunting cars and switching movements all day long. In
addition to these noises an air hammer was in operation at the
time of the occurrence, and for a distance of 100 feet this made
a great deal of noise which interfered with hearing.

The ground under a piece of concrete adjacent to the
conveyor had been on the tracks and was being held back
from which there existingly. Plaintiff was a foreman for the
contractor. On our side operations, his experience in other
underground work and in concrete. The work had for drainage
purposes not being put down at the time of the occurrence, at a
point 200.2 feet east of the viaduct. The well sinking work was
going on between Lefrancois's warehouse tracks (4.1) and the New
York Central track to the north at about the time of the occurrence.
During a period of two or three weeks before the mishap, the
pile, or shaft, had been immediately north of the northwesty
rail of the Lefrancois's warehouse main line track. Plaintiff's
crew worked from 8 in the morning until 4:30 in the afternoon.
About 30 or 40 minutes before quitting time, plaintiff would commence
to shut down operations because by quitting time the men had to
be ready to leave, and the instructions were that everything had to

be down to ground level, pits had to be covered with dirt and gravel had to be placed on top of the pits so as to provide safe and secure footing for trainmen during the night. All the tools had to be loaded into a hand car and brought down the track a distance of 800 feet to the viaduct and placed in the tool house. The carpenter, Mr. Hanna, would have to get all the lumber and have it carried across the track and he would be working right out on the tracks with his saw horses and carpenter tools. It required two men up on the scaffolds 8 or 10 feet above the ground to operate the air hammer. One man had to be on the ground with the block and tackle. The legs of the scaffold would be located between the rails of the westbound main. At the time of the occurrence there were two pits about 40 feet apart that had been dug with shovels and by hand. Each pit was at the edge of the ties and within a distance of 18 inches from the rails over which the trains were operated. The west pit was 813.6 feet east of the viaduct.

Plaintiff had a crew of about 12 green and inexperienced men. None of them had driven piling before. It was necessary for him to watch each piling as it was driven to see that it went down straight and not in a slanting position. Some piling would go down easy and some would go down hard, depending upon the nature of the ground. While the work was being done by the contractor's crew, it was under the supervision of defendant and its employees. Mr. H arold Davis, a civil engineer employed by defendant, occasionally came through and inspected the work. Neither plaintiff nor any of the crew had any supervision over the flagmen, or over the trains, and none of them ever issued any orders or instructions with reference to the flagmen or with reference to the trains. The method of "protecting the job" was left in the hands of the operating department of defendant. Defendant did not rely solely upon the

be down to ground level, pipe had to be covered with dirt and gravel had to be placed on top of the pipe so as to provide salt and secure footing for workmen during the night. All the work had to be looked into a hand rye and measure down the trench a distance of 500 feet to the viaduct and placed in the tool house. The contractor, Mr. Hamm, would move in and all the water and have it carried across the lines and he would be working night and on the trench with his men horses and scrapers. It required two men up on the scrapers a 20 feet above the ground to dump the air blower. One man had to be on the ground with the hose and tools. The lines of the scrapers would be looked between the rails of the northbound main. At the time of the occurrence there were two rails around 40 feet apart that was open and with shovels and by hand. Also all was at the edge of the line and within a distance of 12 inches from the rails over which the trains were operated. The work all was dirt that was of the viaduct.

Plaintiff had a crew of about 17 men and inexperienced men. None of them had worked digging before. It was necessary for him to watch each digging as it was driven to see that it went down straight and not in a slanting position. Some digging would go down easy and some would go down hard, depending upon the nature of the ground. While the work was being done by the contractor's crew, it was under the supervision of defendant and its employees. Mr. H arold Davis, a civil engineer employed by defendant, occasionally came through and inspected the work. Neither plaintiff nor any of the crew had any supervision over the flagmen, or over the trains, and none of them ever issued any orders or instructions with reference to the flagmen or with reference to the trains. The method of "protecting the job" was left in the hands of the operating department of defendant. Defendant did not rely solely upon the

use of bells and whistles for the purpose of warning the workmen. For weeks before the occurrence defendant had established the practice of protecting the men by having the flagman warn them, by slowing down all trains and by stopping them if necessary.

Defendant had provided two flagmen for the purpose of protecting the job and the men. They had red flags. One flagman would be stationed east of the men and the other flagman would be stationed with the men right on the job. The duty of the latter was to notify all crew members by shouting to them, or by actually touching them, if necessary, when a freight train was approaching. The flagmen were supposed to yell, "Heads up, one eastbound, or one westbound," as the case might be. A regular system or custom was adopted to warn all of these men of approaching trains. Whenever a freight train would approach, the flagman would wave his red flag and the freight train would answer. If the flagman wanted to stop the train, he would wave his flag back and forth, and if he wanted to bring the train on through slowly, he would use a circular motion with the flag to permit it to go through slowly, after having warned each member of the crew. The men would all be busy and concentrated upon their work. Plaintiff, as foreman, was the busiest of all and had to supervise all activities. There was a general speed restriction on the curve, which, according to Conductor Hartman, was 20 miles an hour, and according to Engineer Payne was 25 miles an hour. In addition to a general speed restriction, defendant had issued to the train crew of the freight train involved, a "No. 19 order," warning them to look out for the contractor's men, and notifying the train crew that the men would probably be wheeling dirt across the tracks, or fouling the tracks with machinery. It was the custom and practice of freight trains to go through this area at a slow rate of speed, not to exceed 5 to 10 miles an hour.

use of bells and whistles for the purpose of warning the workmen, for weeks before the accidents occurred and established the practice of protecting the men by having the flagmen warn them, by slowing down all trains on sight or stopping them if necessary.

Defendant had provided two flagmen for the purpose of protecting the left and the rear. They had red flags. One flagman would be stationed east of the car and the other flagman would be stationed with the car ready on the job. The duty of the latter was to notify all cars approaching to stop, or to actually touching them, if necessary, when a freight train was approaching. The flagmen were supposed to yell, "Heads in, car westbound," or the case might be. A regular system of signals was adopted in each all of these men of approaching trains. Whenever a freight train would approach, the flagman would move his red flag and the freight train would approach. If the flagman wanted to stop the train, he would move his flag back and forth, and if he wanted to bring the train on he would move it slowly. He would use a circular motion with the flag to permit it to go through slowly, after having warned each member of the crew. The men would all be busy and concentrated upon their work. Plaintiff, as foreman, was the worst of all and had to supervise all activities. There was a general speed restriction on the curve, which, according to Conductor Hartman, was 20 miles an hour, and according to Engineer Lyons was 25 miles an hour. In addition to a general speed restriction, defendant had issued to the train crew of the freight train involved, a "No. 19 order," requiring them to look out for the contractor's men, and notifying the train crew that the men would probably be shoveling dirt across the tracks, or fouling the tracks with machinery. It was the custom and practice of freight trains to go through this area at a slow rate of speed, not to exceed 5 to 10 miles an hour.

Frequently freight trains would be required to stop. Even passenger trains went through at restricted speed. There was evidence that before the occurrence no train was ever operated through the area at a speed to exceed from 5 to 10 miles an hour; that the flagman would warn each man working at the pits, personally and individually, if necessary, and would even go over and touch them and tell them a train was coming. From the evidence it may be said that the jury had a right to decide that the workmen relied upon this method of protection.

Just before the mishap plaintiff had been working with a group of men at the west pit, or shaft. They were driving the piling and quitting time was approaching. The last piling was being driven and was still a few feet up in the air, the air hammer was in operation and two men were on the platform using it. A new pit, or shaft, was to be opened in the morning about 40 feet west of the west pit. Plaintiff walked westerly a distance of about 40 feet in order to determine the location of the new pit to be started in the morning. In accordance with his instructions from Mr. Davis, defendant's civil engineer, plaintiff was required to mark the location of the new pit on the rail with crayon marks. After determining its location and making the crayon marks, he then decided to go over south of the eastbound main and inspect his material. The lumber piles were located there. He wanted to find out if he had enough sheeting or piling to start the new pit in the morning. The air valves to shut off the air hammers were also located there. He wanted to shut off the air as soon as the last piling, then only a few feet above the ground, was completely down, so that no new piling would be started that afternoon. The men would then tear down the scaffolding, cover up the pits, remove the air hoses and clear up their equipment for the night. After making the crayon marks and before walking across the two sets of tracks, plaintiff

frequently freight trains could be required to stop. Even passenger trains went through at regulated speed. There was evidence that before the commencement of train was only partially through the area at a speed to exceed from 5 to 10 miles an hour; that the flagmen would warn each man working at the pit, necessarily and instantly, if necessary, and would even go over and touch them and tell them a train was coming. From the evidence it may be said that the jury had a right to decide that the workmen relied upon this method of protection.

Just before the eleven o'clock whistle had been sounding with a crew of men at the west pit, or shaft. They were carrying the pulley and cutting tiles was proceeding. The last pulley was being driven and was still a few feet up in the air, the air hammer was in operation and two men were on the platform making it. A new pit, or shaft, was to be opened in the morning about 40 feet west of the west pit. Plaintiff walked westerly a distance of about 40 feet in order to determine the location of the new pit to be started in the morning. In accordance with his instructions from Mr. Davis, defendant's civil engineer, plaintiff was endeavoring to mark the location of the new pit to be sunk with wooden stakes. After determining the location and making the stakes, he then proceeded to go over south of the platform into and inspect the material. The lumber piles were located there. He wanted to find out if he had enough shoring or piling to start the new pit in the morning. The air valves to shut off the air hammers were also located there. He wanted to shut off the air as soon as the last piling, then only a few feet above the ground, was completely down, so that no new piling would be started that afternoon. The men would then tear down the scaffolding, cover up the pits, remove the air hose and clear up their equipment for the night. After making the cursory marks and before walking across the new pit of lumber, plaintiff

looked both to the east and to the west. He saw no trains approaching from either direction. He looked first to the east. He then looked to the west for a distance of approximately 500 feet along the tracks and there was no train or engine approaching within that distance. He did not look further than 500 feet down the track. He then looked back toward the west pit to watch his men and see how the piling was going down. He started to walk across the first track, the westbound main (#1), slanting in a southeasterly direction toward the lumber piles and the air valves across the tracks. There was no other way to get there. The flagman was standing near the group of men at the west pit and between the rails of the westbound main (#1). He had his flag with him and was holding it down alongside of his leg. At no time did the flagman change the position of his flag or say anything. Plaintiff was watching his men and watching the flagman. He also looked ahead of him at the lumber piles to see where he was going.

He stepped over the north rail of the eastbound main (#2) and when he was between the two rails he heard the noise or rattling of an approaching train. He turned his head and saw the locomotive only 5 or 6 feet away from him. He jumped to escape. He was actually in the air when the front of the locomotive struck him on his right leg. The speed of the train threw him up in the air and toward the south and he landed over on the river bank in the clear. Plaintiff said he did not hear any train whistle or bell or shouting. Plaintiff suffered grave and serious injuries, resulting in an amputation above the right knee, and injuries to his lower left extremities from below the knee down, including the foot. He required much medical and surgical care and hospitalization, with the injuries permanent. No claim is made that the verdict is excessive, or that the jury was swayed by improper testimony, prejudice or sympathy.

looked both to the east and to the west. He saw no train approaching from either direction. He looked first to the east. He then looked to the west for a distance of approximately 500 feet along the track and there was no train or engine approaching within that distance. He did not look farther than 500 feet down the track. He then looked back toward the east out to watch his men and saw now the siding was going down. He started to walk across the first track, the westbound main (W), planting in a southeasterly direction toward the lumber piles and the air valves across the tracks. There was no other way to get there. The flagman was standing near the gang of men at the east pit and between the rails of the westbound main (W). He had his flag with him and was holding it down alongside of his leg. At no time did the flagman change the position of his flag or say anything. Plaintiff was watching his men and watching the flagman. He also looked ahead of him at the lumber piles to see where he was going.

He stepped over the north rail of the eastbound main (E) and when he was between the two rails he heard the noise or rattling of an approaching train. He turned his head and saw the locomotive only 5 or 6 feet away from him. He jumped to escape. He was actually in the air when the front of the locomotive struck him on his right leg. The speed of the train threw him up in the air and toward the south and he landed over on the river bank in the clear. Plaintiff said he did not hear any train whistle or bell or shouting. Plaintiff suffered great and serious injuries, resulting in an amputation above the right knee, and injuries to his lower left extremities from below the knee down, including the foot. He required such medical and surgical care and hospitalization, with the injuries permanent. No claim is made that the verdict is excessive, or that the jury was swayed by improper testimony, prejudice or sympathy.

East of the viaduct, up to and past the place where plaintiff and his crew were working, there were no obstructions to view. It was wide open along there. At the time of the mishap it was bright, with visibility good. There were no trains on the westbound tracks at the time defendant's train which hit plaintiff came up on the eastbound track. In the engine at the time plaintiff was struck were engineer Wright Payne, fireman Charles Layman and head brakeman Felix Bochart. None of these men placed the engine's speed at the point of the occurrence at more than 12 miles an hour. Fireman Layman said their locomotive proceded east here at the rate of 10 or 12 miles an hour. Brakeman Bochart, who rode in the locomotive cab, said their speed was 10 or 12 miles an hour, and engineer Payne said his speed at the time was not over 10 miles an hour. A witness introduced by plaintiff testified that at the time of the mishap the train was traveling at a speed estimated at 25 to 40 miles an hour. Plaintiff asserts that the speed is demonstrated by the distance the train traveled before coming to a stop after the occurrence. The train carried 36 cars and a caboose. All but 9 or 10 cars had gone on toward the east past plaintiff before it was brought to a stop. This would mean that approximately 25 cars went past plaintiff. Each car being approximately 40 feet in length, the jury had a right to believe that the train traveled a distance of approximately 1,000 feet before coming to a stop after the occurrence.

The conductor of the freight train, Otto A. Hartman, said he rode in the caboose. He gave a deposition for plaintiff which was read into evidence. He said the train was almost stopped as they went under the viaduct; that it was slowing down on a slow order for where the construction workmen were; that the engineer was not going over 6 miles an hour because he could have walked as fast as they were going; that the engineer applied the brakes and slowed down for the men working up the line; and that the engineer

East of the viaduct, up to and past the place where plaintiff and his crew were working, there was no obstruction to view. It was wide open along there. At the time of the mishap it was bright, with visibility good. There were no trains on the westbound track at the time defendant's train which hit plaintiff came up on the eastbound track. In the engine at the time plaintiff was struck were engineer Albert Payne, fireman Charles Lawson and head brakeman Felix Sobczyk. None of these men judged the engine's speed at the point of the occurrence as more than 15 miles an hour. Fireman Lawson said their locomotive proceeded east many of the rate of 10 or 12 miles an hour. Sobczyk testified, who rode in the locomotive cab, said their speed was 10 or 12 miles an hour, and engineer Payne said his speed at the time was not over 20 miles an hour. A witness introduced by plaintiff testified that at the time of the mishap the train was travelling at a speed estimated at 25 to 30 miles an hour. Plaintiff asserts that the speed is demonstrated by the distance the train travelled before coming to a stop after the occurrence. The train carried 30 cars and a caboose. All but 9 or 10 cars had been on toward the east when plaintiff before it was brought to a stop. This would seem that approximately 20 cars went past plaintiff. Each car being approximately 40 feet in length, the jury had a right to believe that the train travelled a distance of approximately 1,000 feet before coming to a stop after the occurrence.

The conductor of the freight train, Otto A. Hartman, said he rode in the caboose. He gave a deposition for plaintiff which was read into evidence. He said the train was almost stopped as they went under the viaduct; that it was slowing down on a slow order for where the construction workmen were; that the engineer was not going over 5 miles an hour because he could have walked as fast as they were going; that the engineer applied the brakes and slowed down for the men working on the line; and that the engineer

slowed down for the slow order they had. Engineer Payne said that the locomotive brakes were in good order; that they had worked all right on previous occasions; and that when brakeman Bochart told him that a man stepped in front of the locomotive he applied the brakes and stopped the train. The engineer was on the right hand or south side of the locomotive and the brakeman was on the left hand or north side of the locomotive. Fireman Charles Layman said that as they passed under the viaduct he was looking along the eastbound main; that as the locomotive approached a group of men who were over on the north side of track #1, one of the men (plaintiff) walked away from the group; that this man crossed over between tracks #1 and #2 and proceeded to walk east between tracks #1 and #2, while they, on the freight train, were moving in an easterly direction on track #2. Fireman Layman testified further that plaintiff walked east about 8 steps, or 25 feet, and then stepped directly in front of their locomotive; that plaintiff was not over 9 or 10 feet from the locomotive when he stepped over in front of it; that he (Layman) hollered to the engineer to hold it; and that the latter immediately set the brake and the train came to a stop. Employees of the contractor testified that they did not hear any shouting, whistle, bell or warning of any kind. Bartholomew, who was down near the viaduct, said he heard the rattling of the train behind him and had to step off in a hurry to protect himself, and that there was no bell or whistle. He was about 500 or 600 feet away from the air hammer and his hearing was good. He was as close to the whistle apparatus as the employees of defendant in the cab of the engine. Employees of the contractor testified that no flagman, nor anyone else, shouted or otherwise warned anyone of the approach of the train. Not one of the employees of the contractor testified that the flagman stepped over into a visible position and approached the track in accordance with his previous custom.

slowed down for the slow order they had. Brakeman Lyons said that the locomotive brakes were in good order; that they had varned all right on previous occasions; and that when brakeman Accurt told him that a man stepped in front of the locomotive he applied the brakes and stopped the train. The engineer was on the right hand or south side of the locomotive and the brakeman was on the left hand or north side of the locomotive. Witness Charles Lyons said that as they passed under the viaduct he was looking along the eastbound main; that as the locomotive approached a group of men who were over on the north side of track #1, one of the men (plaintiff) walked away from the group; that this man crossed over between tracks #1 and #2 and proceeded to walk east between tracks #1 and #2, while they, on the freight train, were moving in an eastbound direction on track #1. Brakeman Lyons testified further in plaintiff walked east about 4 steps, or 12 feet, and then stepped directly in front of their locomotive; that plaintiff was not over 8 or 10 feet from the locomotive when he stepped over in front of it; that he (Lyons) hollered to the engineer to hold it; and that the latter immediately set the brake and the train came to a stop. Employees of the contractor testified that they did not hear any shouting, whistle, bell or warning of any kind. Bertholomew, who was down near the viaduct, said he heard the rattling of the train behind him and had to step off in a hurry to protect himself, and that there was no bell or whistle. He was about 300 or 600 feet away from the air hammer and his hearing was good. He was so close to the whistle operating as the employees of Lehanant in the cab of the engine. Employees of the contractor testified that no flagman, nor anyone else, shouted or otherwise warned anyone of the approach of the train. But one of the employees of the contractor testified that the flagman stepped over into a visible position and approached the track in accordance with his previous custom.

The superintendent of construction, John A. Ransdell, called by defendant, testified that plaintiff was standing with the men at the west well between defendant's tracks and the New York Central tracks when he hollered to look out for the train on the eastbound track. He testified further that he heard the flagman holler to look out for the train on the eastbound track; that he (Ransdell) went on ahead with his work because all the men and equipment were in the clear and that the air hammer was not in operation. The flagman, J. K. Lewis, testified that he was at the hole the workmen were digging, some 800 to 850 feet west of the viaduct; that he saw the train as it was coming under the viaduct; that he warned the men of its coming; that he heard the engineer call for a signal with four short blasts of the whistle; that he gave him a "proceed signal"; that the engineer answered with two short blasts of the whistle; that he placed the speed of the train at 10 or 12 miles an hour as it came on; and that the engineer answered a second "proceed signal" the same way with two short blasts of the whistle. Engineer Payne said that as he approached the scene of the occurrence he had an automatic air bell on the locomotive ringing all the way. He was corroborated in this testimony by fireman Layman and brakeman Bochart. All these enginemen testified that the engineer called for a "proceed signal" with four short blasts of the whistle before coming on up from the viaduct to the scene of the mishap, got the "proceed" signal from the flagman on the job, and answered by two blasts of the whistle.

On cross-examination as to his own lookout for the train that hit him, plaintiff said that as he started to walk from in between defendant's westbound track (#1) and the New York Central tracks, southeasternly across both defendant's westbound and eastbound tracks, he looked west and saw nothing coming; that he only looked to the west this one time, that from the time he looked west

The superintendent of construction, John A. Mandell, called by defendant, testified that plaintiff was standing with the men at the west well between defendant's track and the New York Central tracks when he hollered to look out for the train on the eastbound track. My testimony further that he heard the flagman holler to look out for the train on the eastbound track; that he (Mandell) went on ahead with his score because all the men and equipment were in the clear and that the air hammer was not in operation. The flagman, J. E. Davis, testified that he was at the hole the workmen were digging, some 500 to 600 feet west of the viaduct; that he saw the train as it was coming under the viaduct; that he warned the men of its coming; that he heard the engineer call for a signal with four short blasts of the whistle; that he gave him a "proceed signal"; that the engineer answered with two short blasts of the whistle; that he placed the speed of the train at 10 or 12 miles an hour as it came on; and that the engineer answered a second "proceed signal" the answer with two short blasts of the whistle. Engineer Payne could not be expected the scene of the occurrence he had an automatic air bell on the locomotive ringing all the way. He was corroborated in this testimony by fireman Layman and brakeman Doubert. All three engineman testified that the engineer called for a "proceed signal" with four short blasts of the whistle before coming on up from the viaduct to the scene of the accident, not the "proceed" signal from the flagman on the job, and answered by two blasts of the whistle.

On cross-examination as to his own lookout for the train that hit him, plaintiff said that he he started to walk from in between defendant's westbound track (4) and the New York Central tracks, southeasterly across both defendant's westbound and eastbound tracks, he looked west and saw nothing coming; that he only looked to the west this one time, that from the time he looked west

when standing between defendant's westbound track and the New York Central tracks and the time he saw the engine 5 or 6 feet from him on defendant's eastbound track (#2), he never looked to the west again to see if a train was coming on defendant's tracks; that all along defendant's tracks the view to the west was unobstructed for at least 800 feet from the place where the men were digging the pits; that during his journey of 40 or 50 feet across defendant's tracks and until he met with his mishap on defendant's eastbound track, he had an unobstructed view west along the tracks if he had looked; that the mishap occurred in the afternoon; and that the day was clear and the visibility good.

Defendant urges that the court erred in failing to direct a verdict in its favor and in failing to sustain its motion for judgment notwithstanding the verdict. It maintains that there is no evidence to sustain the charges of negligence and that plaintiff was not in the exercise of due care for his own safety at and just prior to the occurrence and was "contributarily negligent" as a matter of law. Arguing that the judgment stand, plaintiff states that there is an abundance of evidence in the record to sustain the charges of negligence and that the question of contributory negligence was properly submitted to the jury. By a motion to direct a verdict at the close of all the evidence, the sole question presented to the court is whether, admitting the evidence in favor of the plaintiff to be true, that evidence, together with all legitimate conclusions and inferences, fairly tends to sustain plaintiff's cause of action. By a motion for judgment notwithstanding the verdict, the same question is again presented and the same test applied as in deciding a motion for a directed verdict at the close of all the evidence. In deciding these motions, the court had no right to pass upon the credibility of the witnesses, to consider any purported impeachments, the weight thereof, or the weight of

when stopping between defendant's westbound track and the dividing central tracks and he then ran the engine 1 or 2 feet from his car, defendant's westbound train (42), as stated above, was not again to see it a train was coming on plaintiff's track; but if along defendant's tracks the view to the east was obstructed, for at least 300 feet from the place where the car was standing the city; that having his journey of 1) or 30 feet across defendant's tracks and until he met with his wife on defendant's westbound track, he had an unobstructed view east along the tracks of 2 and looked; that the alleged negligence in the defendant; yet not the by was clear and the visibility good.

Defendant urges that the court erred in failing to direct a verdict in its favor and in failing to sustain its motion for judgment notwithstanding the verdict. It contends that there is no evidence to sustain the charge of negligence and that plaintiff was not in the exercise of due care for his own safety at and just prior to the occurrence and was "contributorily chargeable" as a matter of law. Arguing that the judgment should, initially, state that there is an abundance of evidence in the record to sustain the charges of negligence and that the question of contributory negligence was properly submitted to the jury. In a motion to direct a verdict as the close of all the evidence, the sole question presented to the court is whether, admitting the evidence in favor of the plaintiff to be true, that evidence, together with all legitimate conclusions and inferences, fairly tends to sustain plaintiff's cause of action. By a motion for judgment notwithstanding the verdict, the same question is again presented and the same test applied as in deciding a motion for a directed verdict at the close of all the evidence. In deciding these motions, the court has no right to pass upon the credibility of the witnesses, to consider any unsorted inconsistencies, the weight thereof, or the weight of

the testimony, since the motions admit the evidence in favor of plaintiff to be true, together with all legitimate conclusions and inferences. Vieceli v. Cummings, 322 Ill. 559, 562. In order to sustain a recovery, it is not necessary that the evidence support each and every count or charge of negligence contained in the complaint. Where a complaint contains several charges of negligence and where the trial court submits the case to the jury on several counts of negligence, a verdict in favor of the plaintiff must be sustained if the evidence was sufficient to support any one of the counts submitted. Scott v. Parlin & Orendorff Co., 245 Ill. 460; Liska v. Chicago Railways Co., 318 Ill. 570; Schwartz v. Lindquist, 251 Ill. App. 320.

Supporting its argument, defendant states that it is plaintiff's own testimony that he was hit by its engine as he was stepping across the latter's eastbound tracks, and that he noticed the engine first when he was about 5 or 6 feet from it. Defendant further states that its witnesses placed the speed of the engine at the time of the occurrence at 12 miles an hour at the most; that the conductor who was riding in the caboose at the end of a 36 car freight train, said that the train was almost stopped after they went under the viaduct; that the train was not going over 6 miles an hour; that as the train approached the place of the occurrence the engineer applied the brakes and slowed down for the men working up there; and that the engineer Payne said his brakes were in good working order. Defendant calls attention to the testimony that when brakeman Bochart in the cab said to the engineer that a man stepped in front of the engine, that he applied the brakes and stopped. Defendant asserts that it appears from the men in the best position to judge train speed, that the speed was slow rather than excessive; that the engine was under the control of the engineer at all relevant times; that it was never out of control; that the speed of the train was not unusual or dangerous

the testimony, since the motions admit the evidence in favor of plaintiff to be true, together with all legitimate conclusions and inferences. Vinnell v. Cummings, 292 Ill. 559, 566. In order to sustain a recovery, it is not necessary that the evidence support each and every count or charge of negligence contained in the complaint. Here a complaint containing several charges of negligence and where the trial court submits the case to the jury on several counts of negligence, a verdict in favor of the plaintiff must be sustained if the evidence was sufficient to support any one of the counts submitted. Scott v. Terkin & Brandorff Co., 246 Ill. 460; Dinke v. Chicago Railway Co., 218 Ill. 372; Schwartz v. Lindquist, 221 Ill. 466, 472.

Supporting its argument, defendant states that it is plaintiff's own testimony that he was hit by its engine as he was stepping across the latter's westbound tracks, and that he noticed the engine first when he was about 5 or 6 feet from it. Defendant further states that its witnesses placed the speed of the engine at the time of the occurrence at 12 miles an hour at the most; that the conductor who was riding in the caboose at the end of a 36 car freight train, said that the train was almost stopped after they went under the viaduct; that the train was not going over 6 miles an hour; that as the train approached the place of the occurrence the engineer applied the brakes and slowed down for the men working on there; and that the engineer Payne said his brakes were in good working order. Defendant calls attention to the testimony that when brakeman Cochart in the cab said to the engineer that a man stepped in front of the engine, that he applied the brakes and stopped. Defendant asserts that it appears from the men in the best position to judge train speed, that the speed was slow rather than excessive; that the engine was under the control of the engineer at all relevant times; that it was never out of control; that the speed of the train was not unusual or dangerous

under the circumstances; that there was a clear track ahead for the train movement; that the track was clear of any workmen and clear of any construction equipment; that witnesses, such as plaintiff's superintendent Ransdell and the flagman on the job, Lewis, saw the train as far away as the viaduct, about 800 feet; and that plaintiff said he looked toward the viaduct with no obstruction for his vision for 500 feet or more before he was hit. As to the several charges of negligence that it, by its servants, gave no warning of the approach of the train by bell, whistle or signal device, defendant insists that all the positive testimony is that the engineer blew the whistle often warning of the approach of the train; that the automatic bell on the engine sounded continuously; that while there was no signal ~~xxxx~~ device at the precise place of the occurrence, it was not a public crossing or other spot in the yards which required the installation of one; that there was a flagman who was on the job with the construction crew to warn all on the job, including plaintiff, of the approach of trains; that he did warn the workmen of the approach of the train; that superintendent Ransdell also warned the workmen of the approach of the train; that the engineer Payne, brakeman Bochart and fireman Layman testified that the bell on the engine, operated by air, was turned on a mile west of where the mishap occurred; that it rang continuously until after that; that engineer Payne testified he approached the viaduct at 5 or 6 miles an hour; that he whistled four short blasts of the whistle; that he received a signal to proceed; that he proceeded easterly at a reduced speed of 4 or 5 miles an hour, and that he saw workmen off to the left of his #2 track; that he whistled again for a signal; that when he whistled this time, a flagman in the construction gang gave him a

under the circumstances; that there was a clear track ahead for the train movement; that the track was clear of any workmen and clear of any construction equipment; that witnesses, such as plaintiff's superintendent Kendall and the flagman on the job, Lewis, saw the train as far away as the viaduct, about 800 feet; and that plaintiff said he looked toward the viaduct with no obstruction for his vision for 800 feet or more before he was hit. As to the several charges of negligence that it, by its servants, gave no warning of the approach of the train by bell, whistle or signal device, defendant insists that all the positive testimony is that the engineer blew the whistle often warning of the approach of the train; that the automatic bell on the engine sounded continuously; that while there was no signal \warning device at the place of the occurrence, it was not a public crossing or other act in the yards which required the installation of one; that there was a flagman who was on the job with the construction crew to warn all on the job, including plaintiff, of the approach of trains; that he did warn the workmen of the approach of the train; that superintendent Kendall also warned the workmen of the approach of the train; that the engineer Payne, brakeman Hobart and fireman Layman testified that the bell on the engine, operated by air, was turned on a mile west of where the mishap occurred; that it rang continuously until after that; that engineer Payne testified he approached the viaduct at 5 or 6 miles an hour; that he whistled four short blasts of the whistle; that he received a signal to proceed; that he proceeded westerly at a reduced speed of 4 or 5 miles an hour, and that he saw workmen off to the left of his 2 track; that he whistled again for a signal; that when he whistled this time, a flagman in the construction gang gave him a

signal to proceed; that Payne's testimony was corroborated by the testimony of Layman and Bochart; that Lewis, the flagman with the construction crew, said he heard the engineer call for a signal with four blasts of the whistle; that this was the usual call; that he gave the engineer a "proceed" signal with a white piece of paper in his hand; that he was answered by two short blasts of the whistle; that he gave the engineer a second signal in the same manner as the first; that the latter answered with two short blasts of the whistle; and that there was testimony that these signals were relayed to the engineer by fireman Layman and brakeman Bochart.

Defendant asserts that the testimony on behalf of plaintiff that before he stepped across the eastbound tracks, he did not hear a whistle blow, or a bell sound, is negative and may not raise a question of fact in the face of positive testimony that the engine whistle was blown and its bell sounded. Citing Urban v. Pere Marquette R. R. Co., 266 Ill. App. 152. As to the charge of negligence that defendant failed to keep a proper lookout in the direction the train was coming, defendant, citing Carrell v. New York Central R. R. Co., 384 Ill. 599; Chicago & Alton R. R. Co. v. Thompson, Adm'r., 99 Ill. App. 277; Roberts v. Capital Transit Co., 131 Fed. (2d) 871; and Morgan v. New York Central R. R. Co., 327 Ill. 339, points out that while fireman Layman and brakeman Bochart saw plaintiff walking east ahead of their engine and alongside their #2 eastbound track, there was nothing in that situation to lead them to suppose plaintiff would step across the eastbound tracks and place himself in front of their engine; that the natural and expected supposition would be that plaintiff would not do this; and that there was nothing in the conduct of plaintiff as he was walking along the side of the #2 track to indicate that he was going to cross over the track where he did, or at any place along the track. As to the charge that defendant failed and

signal to proceed; that Payne's testimony was corroborated by the testimony of Layman and Doobert; that Lewis, the flagman with the construction crew, said he heard the engineer call for a signal with four blasts of the whistle; that this was the usual call; that he gave the engineer a "proceed" signal with a white piece of paper in his hand; that he was answered by two short blasts of the whistle; that he gave the engineer a second signal in the same manner as the first; that the latter answered with two short blasts of the whistle; and that there was testimony that these signals were relayed to the engineer by firemen Layman and brakeman Doobert.

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neglected to have its flagman stationed in a proper position a sufficient distance west of the point of the occurrence, defendant, citing Newell v. Cleveland, C. C. & St. L. R. R. Co., 261 Ill. 505, submits that plaintiff's theory is illogical on the question as to "who is to stop, - the man or the train"; that the theory would permit the point wherever plaintiff chose to cross the tracks to determine where a flagman should be; that it is not required that a railroad train be flagged down for a pedestrian on the tracks; that the pedestrian must give way to the oncoming engine; that all the men, plaintiff included, were along the westbound #1 track and not along the #2 track of the eastbound train when that train came up from the viaduct; that at that time all the men were clear of the oncoming train; that the flagman was with the workmen along the westbound track; that he shouted to him of the approaching train and so did Ransdell; that there was in this situation no occasion for the flagman to go over to the eastbound track and flag the train; and that, in fact, plaintiff "passed along the westbound track by the flagman to the north and easterly behind him before cutting across to the eastbound track where he was struck."

Urging that plaintiff was not in the exercise of due care for his own safety at and just prior to the occurrence, defendant states that this was a necessary and material allegation and must be proven. Newell v. Cleveland, C. C. & St. L. Ry. Co., 261 Ill. 505,508; Urban v. Pere Marquette R. R. Co., 266 Ill. App. 152. Defendant states further that plaintiff knew freight trains came along the eastbound track frequently; that it was a clear day with visibility good; that according to plaintiff's testimony, the first indication of danger he had was when he was on the track with the engine 5 or 6 feet from him; that from the time he was standing between defendant's

neglected to have its flagman stationed in a proper position a sufficient distance west of the point of the occurrence, defendant, citing Howell v. Cleveland, C. C. & St. L. R. R. Co., 261 Ill. 305, submits that plaintiff's theory is illogical on the question as to "who is to stop, - the man or the train"; that the theory would permit the point wherever plaintiff chose to cross the tracks to determine where a flagman should be; that it is not required that a railroad train be flagged down for a pedestrian on the tracks; that the pedestrian must give way to the oncoming engine; that all the men, plaintiff included, were along the westbound #1 track and not along the #2 track of the eastbound train when that train came up from the viaduct; that at that time all the men were clear of the oncoming train; that the flagman was with the workmen along the westbound track; that he shouted to him of the approaching train and so did Ganadell; that there was in this situation no occasion for the flagman to go over to the eastbound track and flag the train; and that, in fact, plaintiff "passed along the westbound track by the flagman to the north and easterly behind him before cutting across to the eastbound track where he was struck."

Urging that plaintiff was not in the exercise of due care for his own safety at and just prior to the occurrence, defendant states that this was a necessary and material allegation and must be proven. Howell v. Cleveland, C. C. & St. L. Ry. Co., 261 Ill. 305, 308; Urban v. Pere Marquette R. R. Co., 266 Ill. App. 185. Defendant states further that plaintiff knew freight trains came along the westbound track frequently; that it was a clear day with visibility good; that according to plaintiff's testimony, the first indication of danger he had was when he was on the track with the engine 3 or 6 feet from him; that from the time he was standing between defendant's

westbound track (#1) and the New York Central track and looked to the west to see if a train was coming, he never looked again to the west to see if a train was coming until he was actually struck; that he only looked that one time; that the view was unobstructed for at least 800 feet; that when he looked he did not look as far as the viaduct; that if he had looked as far as the viaduct he would probably have seen the train; that there was nothing to obstruct the view; and that during the journey of 40 or 50 feet until the occurrence he had an unobstructed view west along defendant's tracks, if he had looked. Defendant submits that "under the foregoing testimony of plaintiff there was an entire failure of proof on his part that he was in the exercise of due care and caution for his own safety." ~~xxx~~ Defendant states further that the engine was at all times in plain view; that had plaintiff taken even a slight glance before he went on the track he could not have helped but see it; that had he been paying any attention he could not have helped hearing its approach; that the engine was equipped with an automatic bellringer, which was ringing; that an engine with its puffing, the noise of the wheels on the tracks and the clanging of the various driving mechanisms and appliances, makes considerable noise; that plaintiff could have refrained from going in front of the engine had he looked; that on the other hand relatively, it was impossible as a practical matter to have stopped the train in the 5 or 6 feet plaintiff says he first saw it; that even if noise from an air hammer might conceivably have interfered with plaintiff's hearing the train bell or whistle, or other train rattle, such was no excuse or justification for plaintiff's failure to look for the train before stepping on the eastbound tracks. In support of its argument, defendant cites Carrell v. New York Central R. R. Co., 384 Ill. 599; Gately v. C. & E. I. R. R. Co., 138 Fed. (2) 222; Greenwald v. B. & O. R. R. Co., 332 Ill. 627; Illinois Central R. R. Co. v. Oswald, 338 Ill. 270, 274; Morgan v. New York Central RR Co.,

westbound track (#1) and the New York Central track and looked to the west to see if a train was coming, he never looked again to the west to see if a train was coming until he was actually struck; that he only looked that one time; that the view was unobstructed for at least 800 feet; that when he looked he did not look as far as the viaduct; that if he had looked as far as the viaduct he would probably have seen the train; that there was nothing to obstruct the view; and that during the journey of 40 or 50 feet until the occurrence he had an unobstructed view west along defendant's tracks, if he had looked. Defendant submits that "under the foregoing testimony of plaintiff there was an entire failure of proof on his part that he was in the exercise of due care and caution for his own safety." Defendant states further that the engine was at all times in plain view; that had plaintiff taken even a slight glance before he went on the track he could not have helped but see it; that had he been paying any attention he could not have helped hearing its approach; that the engine was equipped with an automatic bellringer, which was ringing; that an engine with its puffing, the noise of the wheels on the tracks and the clanking of the various driving mechanisms and appliances, makes considerable noise; that plaintiff could have ascertained from going in front of the engine had he looked; that on the other hand relatively, it was impossible as a practical matter to have stopped the train in the 5 or 6 feet plaintiff says he first saw it; that even if noise from an air hammer might conceivably have interfered with plaintiff's hearing the train bell or whistle, or other train rattle, such was no excuse or justification for plaintiff's failure to look for the train before stepping on the eastbound tracks. In support of its argument, defendant cites Carroll v. New York Central R. R. Co., 334 Ill. 380; Cotely v. C. & E. I. T. R. Co., 138 Fed. (2) 322; Greenwald v. B. & O. R. R. Co., 332 Ill. 627; Illinois Central R. R. Co. v. Oswald, 332 Ill. 270, 274; Morrow v. New York Central RR Co.,

327 Ill. 339; Provenzano v. Illinois Central Co., 357 Ill. 192; Kennemer v. Western & A. R. R. Co., 155 S. E. 771, 772.

A study of the record convinces us that substantial competent evidence was presented to sustain the charges of negligence made against defendant, also, to support the allegation that plaintiff was in the exercise of due care for his own safety at and just prior to the time of the occurrence. As to the charge that no warning of the approaching train by bell, whistle or signal device was given, it will be recalled that Bartholomew, who was walking along the tracks when the train surprised him and he quickly stepped off to get out of its way, testified that he did not hear any bell. He said there was nothing wrong with his hearing. Other employees of the contractor testified that they heard no bell or whistle. They were in position to have heard it, if such warning was sounded. All of these witnesses had to base their testimony upon their sense of hearing. This is true also of the testimony of the other witnesses, except the engineer. He was the only one who claimed he blew the whistle. He was the only one to perform the physical act. Bartholomew heard the rattling of the train before it reached him. He stood aside and waited for it to pass. He was as close, or closer, to the whistle apparatus, which is located externally on top of the boiler, than either the fireman or the brakeman in the cab, or the conductor in the caboose 36 car lengths away. In Berg v. New York Central R. R. Co., 391 Ill. 52, the court said (60):

"It is well settled that negative evidence is admissible where the attending circumstances are such as to show that it has some probative force. (Chicago and Alton Railroad Co. v. Dillon, 123 Ill. 570; Peoria, Pekin and Jacksonville Railroad Co. v. Siltman, 88 Ill. 529.) It is obvious that if a witness, without explanation of his evidence, testifies that he did not hear a bell or whistle, such testimony would have no value. To give it probative force, it must appear that the witness was in such proximity that he could have heard the sound had it been given, and that his attitude of attention

207 Ill. 85); Greenberg v. Illinois Central Co., 227 Ill. 109; Kennedy v. Western & A. R. R. Co., 102 N. Y. 372.

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"It is well settled that negative evidence is admissible where the attending circumstances are such as to show that it has more probative force. (Chicago and Alton Railroad Co. v. Tilton, 77 Ill. 279; Joyce, Smith and Greenville Railroad Co. v. Mitchell, 93 Ill. 290.) It is obvious that if a witness, without explanation of his evidence, testifies that he did not hear a bell or whistle, such testimony would have no value. To give it probative force, it must appear that the witness was in such proximity that he could have heard the sound had it been given, and that his attitude of attention

was such that if the bell or whistle had sounded it would have attracted his attention. * * * Each of them testified that if the bell or whistle had sounded they would have heard it. They were so near they heard the rumble of the train and they testified to facts which indicated an attentive alertness for the sound of the bell or whistle. Such testimony had probative force on the question of fact at issue, and it was for the jury to determine the weight and credit to be given it. We conclude that the negative evidence of plaintiff's witnesses as to the sounding of the bell or the blowing of the whistle raised an issue of fact with positive testimony of defendant's witnesses on the same subject. There was a conflict in the evidence on this issue and its weight was for the jury."

In Styblo v. McNeil, 317 Ill. App. 316, we said (325):

"If a defendant were not in fact sounding his siren, the normal way for a plaintiff to prove such fact would be by producing witnesses who were within hearing distance to testify that they did not hear a siren. If negative testimony of this character is to be disregarded, then it would be well nigh impossible to prove in any case that the siren was not sounded. We do not view the cases of Provenzano v. Illinois Cent. R. Co. 357 Ill. 192, 196, and Bryan v. City of Chicago, 371 Ill. 64, 70, as holding that testimony of a negative character is to be disregarded. Such Testimony is to be carefully searched and weighed."

In our opinion, the negative testimony in support of plaintiff's charge that no bell, whistle or warning signal of the approaching train was given, had probative force, and it was for the jury to determine the weight and credit to be given.

With the exception of the Thompson and Gately cases, the authorities cited by defendant relate to pedestrians, travelers and trespassers. In the instant case plaintiff occupied the status of an invitee. There was evidence to justify the jury in finding that defendant was also negligent in the conduct of its flagman and on the question of excessive speed and improper control of the train. On the evidence the jury could find that plaintiff crossed the tracks in reliance upon: (1) An observation of about 500 feet, which he considered a safe distance and which was a safe and sufficient distance for any conditions or any speeds he was required to anticipate; (2) The position and conduct of the flagman, that is, his failure to step out toward the train and use his flag; (3) The duty of the flagman to give oral warning; (4) The invariable practice

was such that if the bell or whistle had sounded it would have attracted his attention. * * * Each of them testified that if the bell or whistle had sounded they would have heard it. They were so near they heard the rumble of the train and they testified to facts which indicated an attentive alertness for the sound of the bell or whistle. Such testimony had probative force on the question of fact at issue, and it was for the jury to determine the weight and credit to be given it. We conclude that the negative evidence of plaintiff's witnesses as to the sounding of the bell or the blowing of the whistle raised an issue of fact with positive testimony of defendant's witnesses on the same subject. There was a conflict in the evidence on this issue and its weight was for the jury."

In Atwile v. McNeil, 317 Ill. App. 318, we said (322):

"If a defendant were not in fact sounding his siren, the normal way for a plaintiff to prove such fact would be by producing witnesses who were within hearing distance to testify that they did not hear a siren. If negative testimony of this character is to be disregarded, then it would be well nigh impossible to prove in any case that the siren was not sounded. We do not view the cases of Provenzano v. Illinois Cent. R. Co. 327 Ill. 122, 158, and Bryan v. City of Chicago, 271 Ill. 54, 70, as holding that testimony of a negative character is to be disregarded. Such testimony is to be carefully searched and weighed."

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previously followed by the defendant to operate its freight trains not to exceed from 5 to 10 miles an hour; and (5) the duty of the engine crew under the No. 19 order to look out for and protect the contractor's men. Bartholomew testified that when the train passed him it was going 25 to 30 miles an hour; Hanna stated that it was going 30 miles an hour; Largent gave the speed at 35 to 40 miles an hour; and Jensen said it was moving at a speed of about 35 miles an hour. These witnesses testified that they had never seen a train go through there at a speed of more than 5 or 10 miles an hour. There was competent evidence that the train went 10 to 20 car lengths after the occurrence, which would be 400 to 800 feet or more. This was a circumstance which the jury had a right to consider in determining whether the train was moving at an excessive speed. From the evidence the jury had a right to decide that the defendant in the conduct of its flagman was negligent. Defendant assumed the duty to warn, protect and look out for the workmen, and had provided flagmen, issued a "19 order," enforced speed regulations, adopted the custom to stop or slow down to 5 or 10 miles an hour, and then failed to comply with its own rules and customs. There was evidence that the flagman stood idly by and made no attempt to protect plaintiff.

We agree with plaintiff that the question of contributory negligence was properly submitted to the jury. Plaintiff was not a trespasser or a licensee. He occupied the position of an invitee. The substantive rights of the parties are governed by the laws of Ohio, where the mishap occurred, and the procedure by the laws of Illinois. O'Neal v. Caffarello, 303 Ill. App. 574. In both Ohio and Illinois plaintiff occupies the status of an invitee. In Hozian v. Crucible Steel Casting Co., 132 Ohio, 453, 9 N. E. (2) 143, the court said:

previously followed by the defendant in operating its freight trains not to exceed from 5 to 10 miles an hour; and (5) the duty of the engine crew under the No. 19 order to look out for and protect the pedestrian's man. Hutchinson testified that when the train passed him it was going 25 to 30 miles an hour; James stated that it was going 30 miles an hour; Sargent gave the speed at 25 to 40 miles an hour; and Lemon said it was moving at a speed of about 35 miles an hour. These witnesses testified that they had never seen a train go through there at a speed of more than 5 or 10 miles an hour. There was competent evidence that the train went 10 to 20 car lengths after the occurrence, which would be 300 to 400 feet or more. This was a circumstance which the jury had a right to consider in determining whether the train was moving at an excessive speed. From the evidence the jury had a right to decide that the defendant in the conduct of its flagman was negligent. Defendant assumed the duty to warn, protect and look out for the pedestrian, and the overhead flagman, issued a "12 order," enforced speed regulations, adopted the custom to stop or slow down to 5 or 10 miles an hour, and then failed to comply with its own rules and customs. There was evidence that the flagman stood idly by and made no attempt to protect plaintiff.

We agree with plaintiff that the question of contributory negligence was properly submitted to the jury. Plaintiff was not a trespasser or a licensee. He occupied the position of an invitee. The substantive rights of the parties are governed by the laws of Ohio, where the mishap occurred, and the procedure by the laws of Illinois. C'Neal v. Gettysville, 300 Ill. App. 374. In both Ohio and Illinois plaintiff occupies the status of an invitee. In Morgan v. Dunville steel Tanning Co., 132 Ohio, 493, 9 N. E. (2) 142, the court said:

"There is little or no dissent from the proposition that, when the owner or occupier of premises engages an independent contractor to do work thereon, an employee of the contractor, while executing the work, is impliedly there at the request of the owner and is an invitee toward whom the owner owes the duty of exercising ordinary care."

See also Southern Ry. Co. v. Drake, 107 Ill. App. 12; Spry Lumber Co. v. Duggan, 182 Ill. 218, 54 N. E. 1002; Lake Shore & Michigan Southern Ry. Co. v. Enright, 129 Ill. App. 223; Reynolds v. John Brod Chemical Co., 192 Ill. App. 157. We agree with plaintiff that the doctrine which applies to railroad crossings has no application in the case at bar. Travelers at a railroad crossing and pedestrians on the tracks are not engaged in work and required to be in a position near passing trains and cars. They are not lulled into a sense of security to the extent of workers on the tracks. They are not busy and concentrated on duties of the right of way. In VanZandt v. Philadelphia B. & W. R. R. Co., 248 Pa. 276, 93 Atl. 1010, plaintiff, an employee of the American Paving Company, was sawing braces by the tracks when struck by a train. The court held that it was apparent that his position was "entirely different from that of a traveler who was about to pass over the tracks of a railroad at a public crossing." The court said further (280):

"The same rules of conduct, however, cannot be applied to a railroad company and one employed on or along its tracks. The rights and duties of both the company and the person employed are essentially different. The workman is engaged to perform his service on or along the tracks. His presence there is necessary in the discharge of his duties. Trains may be passing every few minutes or even seconds and his safety requires that he avoid a collision. It is apparent, therefore, that if he is to be constantly looking out for an approaching train he cannot perform the service for which he is employed. Such a duty is entirely inconsistent with the performance of his duty toward his employer. Such attention to passing trains running as frequently as suggested would defeat the very object for which the workman was employed. It is, therefore, unreasonable and hence not expected, and necessarily the law does not require it."

The Pennsylvania court pointed out that a railroad is fully aware not that he may be in a place of danger, like the traveler at the crossing, but that his duty requires him to be and he is actually

> "There is little or no dissent from the proposition that, when the owner or occupier of premises employs an independent contractor to do work thereon, as employee of the contractor, while executing the work, is impliedly there at the request of the owner and is an invitee towards whom the owner owes the duty of exercising ordinary care."

See also Southern Pr. Co. v. Pedis, 107 Ill. App. 1; Gary Lumber Co. v. Thomas, 187 Ill. 219, 24 N. E. 1067; Lake Shore & Michigan Southern Ry. Co. v. Ewing, 129 Ill. App. 223; Lavalle v. John Ford Chevrolet Co., 108 Ill. App. 177. In accord with Schnitzer that the doctrine which applies to railroad crossings has no application in the case at bar. Travelers at a railroad crossing and pedestrians on the tracks are not engaged in work and required to be in a position near moving trains and cars. They are not lulled into a sense of security to the extent of workers on the tracks. They are not busy and concentrated on matters of the right of way. In Lenhart v. Philadelphia & R. Ry. Co., 240 Pa. 172, 87 Atl. 1010, plaintiff, an employee of the American Railway Express, was making breaks by the tracks when struck by a train. The court said that it was apparent that his position was "entirely different from that of a traveler who was about to pass over the tracks of a railroad at a public crossing." The court said further (280):

> "The same rules of conduct, however, cannot be applied to a railroad company and one employed on or along its tracks. The rights and duties of both the company and the person employed are essentially different. The person is engaged to perform his service on or along the tracks. His presence there is necessary in the discharge of his duties. Trains may be passing every few minutes or even seconds and his safety requires that he avoid a collision. It is apparent, therefore, that if he is to be correctly looking out for an approaching train he cannot perform the service for which he is employed. Such a duty is entirely inconsistent with the performance of his duty toward his employer. Such attention to passing trains requires as frequently as suggested would defeat the very object for which the workmen was employed. It is, therefore, unreasonable and leads to absurdities, and necessarily the law does not require it."

The Pennsylvania court pointed out that a railroad is fully aware not that he may be in a place of danger, like the traveler at the crossing, but that his duty requires him to be and is actually

present at the place of danger when its train is passing; that it knows that the faithful performance of his duties prevents his constant watchfulness for approaching trains and that hence the imperative necessity for a signal or notice sufficiently adequate and timely that, by the exercise of due care on his part, he may escape a collision. See also Willig v. C. B. & Q. R. R. Co., 121 S. W. (2d) 204; Jones v. Southern Pacific Co., 239 Pac. 429; Pridmore v. C. R. & P. R. Co., 275 Ill. 386; Reidel v. C. R. I. & P. R. Co., 144 Ill. App. 424, affirmed 239 Ill. 362; Illinois Terminal R. R. Co. v. Mitchell, 214 Ill. 151; Ware v. Cincinnati Northern R. R. Co., (Ohio) 177 N. E. 383; Goodfellow v. Boston, Hartford & Erie R. Co., 106 Mass. 461; O'Brien v. Chicago City Ry. Co., 220 Ill. App. 107.

The mishap occurred in the center of the curve, about 800 feet east of the viaduct. Plaintiff testified that he looked down the track a distance of 500 feet, and that "you couldn't tell what track a train would be on until it got within 200 or 300 feet from you." The distance which plaintiff observed, namely, 500 feet coincides with the distance from the point of the occurrence westerly to the point where the curve commences. In Smith v. Zone Cabs, et al., 135 Ohio 415, 21 N. E. (2d) 336, plaintiff was attempting to cross a busy downtown street in the middle of the block. He noticed the cab about 285 feet away, but thought he could safely cross. An ordinance required the pedestrian to cross at the crosswalk and otherwise to yield the right of way. The Ohio Supreme Court held that both contributory negligence and proximate cause, being separate elements, were for the jury, stating:

"Plaintiff looked only once, but if, in his judgment, the way seemed clear, he was not bound, as a matter of law, to look again. Whether his failure to look again was, under all circumstances then and there present, contributory negligence as a matter of fact, is a question for the jury, not for the court."

presence at the place of danger when the train is passing; that it shows that the habitual performance of his duties prevents his constant watchfulness for approaching trains and that hence the imperative necessity for a signal or notice sufficiently adequate and timely that, by the exercise of due care on his part, he may escape a collision. See also Gillie v. C. C. C. & St. L. Co., 121 S. W. (2d) 904; James v. Southern Pacific Co., 92 Pac. 475; Fridmore v. N. Y. C. & H. R. Co., 275 Ill. 554; Hadley v. C. C. I. & L. R. Co., 144 Ill. App. 424, affirmed 239 Ill. 324; Illinois Terminal R. R. Co. v. Mitchell, 74 Ill. 181; Moore v. Chesapeake Northern R. R. Co., (Ohio) 177 N. E. 702; Mortellaro v. Boston, Hartford & Erie R. Co., 108 Misc. 481; Gilpin v. Chicago City Ry. Co., 220 Ill. App. 107.

The sharp occurred in the center of the curve, about 600 feet east of the viaduct. Plaintiff testified that he looked down the track a distance of 600 feet, and that "you couldn't tell what track a train would be on until it got within 500 or 300 feet from you." The distance which plaintiff observed, namely, 100 feet coincides with the distance from the point of the occurrence westerly to the point where the curve commences. In Smith v. Zone Cons. et al., 135 Ohio 410, 21 N. E. (2d) 358, plaintiff was attempting to cross a busy downtown street in the middle of the block. He noticed the cab about 225 feet away, but thought he could safely cross. An ordinance required the pedestrian to cross at the crosswalk and otherwise to yield the right of way. The Ohio Supreme Court held that both contributory negligence and proximate cause, being separate elements, were for the jury, stating:

> "Plaintiff looked only once, but if, in his judgment, the way seemed clear, he was not bound, as a matter of law, to look again. Whether his failure to look again was, under all circumstances then and there present, contributory negligence as a matter of fact, is a question for the jury, not for the court."

Under the doctrine announced in the Smith v. Zone Cabs case, the failure of plaintiff to look a second time cannot, as a matter of law, be held to be contributory negligence. In Fox v. Conway, 133 Ohio, 273, 13 N. E. (2) 124, where it appeared that plaintiff looked for an approaching interurban car when 10 feet from the tracks, but never looked again, the court held that the fact that plaintiff failed to look again did not constitute contributory negligence as a matter of law.

In Moran v. Gatz, 390 Ill. 478, our Supreme Court said (486):

"The question of contributory negligence is one which is pre-eminently for the consideration of a jury. It cannot be defined in exact terms and unless it can be said that the failure of the plaintiff to look again was so palpably contrary to the conduct of a reasonably prudent person as to show contributory negligence, the issue is one for the jury. (Blumb v. Getz, 366 Ill. 273.) Whether failure to look was shown and constituted, in this case, want of due care, was an issue of fact for the jury. Morrison v. Flowers, 308 Ill. 189."

Finally, defendant maintains that it was error to overrule its motion for a new trial because the verdict was against the manifest weight of the evidence. We are convinced that the verdict is amply supported by competent evidence and that it is not against the manifest weight of the evidence. For the reasons stated, the judgment of the Superior Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

LEWE, P.J. and
KILEY, J. CONCUR.

Under the doctrine announced in the *Smith* v. *Ryan Cabs Co.*, the failure of plaintiff to look a second time cannot, as a matter of law, be held to be contributory negligence. In *Ray* v. *Yanez*, 120 Ohio, 272, 12 N. E. (2) 124, where it appeared that plaintiff looked for an approaching interurban car when 10 feet from the tracks, but never looked again, the court held that the fact that plaintiff failed to look again did not constitute contributory negligence as a matter of law.

In *Kohne* v. *Kelly*, 200 Ill. 475, our Supreme Court said (486):

> "The question of contributory negligence is one which is pre-eminently for the consideration of a jury. It cannot be defined in exact terms and always it can be said that the failure of the plaintiff to look again was so palpably contrary to the conduct of a reasonably prudent person as to make contributory negligence, the issue is one for the jury. (*Pierce* v. *Dietz*, 207 Ill. 272.) Whether Kohne's failure to look was wrong and constituted, in this case, want of due care, was an issue of fact for the jury. *Morrison* v. *Fleming*, 203 Ill. 339."

Finally, defendant contends that it was error to overrule its motion for a new trial because the verdict was against the manifest weight of the evidence. We are convinced that the verdict is amply supported by competent evidence and that it is not against the manifest weight of the evidence. For the reasons stated, the judgment of the Superior Court of Cuyahoga County is affirmed.

JUDGMENT AFFIRMED.

LUSE, P.J., and
KILBURN, J., CONCUR.

43543

34

AIR CONDITIONING TRAINING COMPANY, a corporation, Plaintiff - Appellant, v. JOHN HILDEBRAND, Defendant - Appellee.	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

336 I.A. 134

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action to recover the balance which plaintiff claims is due under defendant's contract for a course of training in "theory and practice of Air Conditioning and Electric and Gas Refrigeration." Defendant counter-claimed to recover the amount which he paid under the alleged contract. The jury's verdict was in defendant's favor on the statement of claim and in favor of plaintiff on the counter-claim. Plaintiff has appealed.

Defendant at the time of the trial was 37 years old, employed as a mail handler and was earning $22 a week. His wife signed and returned to plaintiff a postal card mailed to defendant, requesting information about its course of training in Air Conditioning and Refrigeration. Thereafter plaintiff's agents called at defendant's home. They displayed to defendant and his wife literature pertaining to the courses and made representations with respect to the enhancement of defendant's future, should he take the course. Defendant resisted the salesmanship, but his wife was impressed and importuned him to sign the application. He signed the application November 19, 1941. It was accepted by plaintiff about November 22, 1941. Defendant made a down payment of $24.50 and agreed to pay $6 per month until the course of 105 lessons was completed. After his application was accepted he

CASES

An operations training course, a corporation,	
Plaintiff - appellant,	
v.	
John Milkowski,	
Defendant - appellee.	

A. Motion after judgment for damages on the ground.

This is an action to recover the balance owing plaintiff claims is due under defendant's contract for a course of training in "theory and practice of air conditioning and electric and gas refrigeration." Defendant counterclaims to recover the amount which he paid under the alleged contract. The jury's verdict was in defendant's favor on the statement of claim and in favor of plaintiff on the counterclaim. Plaintiff has appealed.

Defendant at the time of the trial was 27 years old, employed as a mail handler and was earning $45 a week. His wife signed and returned to plaintiff a dated card called be defendant, requesting information about the course of training in air conditioning and refrigeration. Thereafter plaintiff's agents called at defendant's home. They identified to defendant and his wife literature pertaining to the courses and made representations with respect to the advancement of defendant's future, should he take the course. Defendant realized the disadvantage, but his wife was impressed and importuned him to sign the application. He signed the application November 19, 1941. It was accepted by plaintiff about November 28, 1941. Defendant made a down payment of $24.50 and agreed to pay $2 per month until the course of 100 lessons was completed. After his application was accepted he

received a book containing 14 lessons. He passed the first 7 examinations but failed in the 8th. He refused to retake this last examination despite the advice of plaintiff. He refused to make further payments. He had experienced difficulty in making payments from the beginning. Plaintiff sued.

In his answer defendant claimed a lack of mutuality in the contract and fraud which induced him to sign the application. He averred that the plaintiff was doing business in Illinois without authority; was conducting business in violation of Illinois law; and was unqualified to maintain this suit in Illinois. His counter-claim was based on the same averments.

Defendant offered to pay $224.50 for the course of training. Plaintiff accepted the offer. It sent 14 mimeographed lessons, gave him 8 examinations, corrected the examination papers and returned them to him. He made several payments and sent several communications to plaintiff which indicated his satisfaction. Under these circumstances we believe that if the contract originally lacked mutuality, the deficiency was supplied by defendant's subsequent conduct. Air Conditioning Training Corp. v. Majer, 324 Ill. App. 387.

Defendant signed the application in Chicago, Illinois. It was accepted at plaintiff's place of business at Youngstown, Ohio. It sent the material to defendant and conducted the examinations from, graded the papers in, and returned them from Youngstown, Ohio. In its proof plaintiff admitted it was not licensed to do business in Illinois under the Corporation Act, Par. 157.102 and had no certificate of registration and education authorizing it to conduct in this State a professional correspondence school under Chap. 144, Par. 17 (a) Ill. Rev. Stats. Defendant says that, since it lacks these certificates, plaintiff can neither maintain this action nor lawfully conduct its school in this State

received a book concerning it Jackson. He mailed his first 2 examinations but failed to see him. He refused to pay the last examination fearing the advice is illegal. He returned to make further payments, asking he has experienced difficulty in making payments from the beginning. Plaintiff paid.

In his answer defendant claimed a lack of authority in the contract and fraud which induced him to sign the application. He averred that the plaintiff was doing business in Illinois without authority; was conducting the business in violation of Illinois law; and was unqualified to maintain this suit in Illinois. The counter-claim was based on the same averments.

Defendant filed to say 2004.00 for the course of training. Plaintiff accepted the offer. It had in acknowledged issues, gave his 4 examinations, corrected his examination answers and returned them to him. On such several occasions and last several communications to plaintiff which indicate his satisfaction. Under these circumstances we believe that if the company originally lacked authority, the deficiency was supplied by defendant's subsequent conduct. See Qualitycraft Training Corp. v. Miller, 324 Ill. App. 387.

Defendant signed the contracting in Chicago, Illinois. It was accepted at plaintiff's home of business in Youngstown, Ohio. It sent the material to defendant and announced the examinations from, grades the course in, and returned them from, Youngstown, Ohio. In the court plaintiff contend it was not licensed to do business in Illinois under the Securities act, par. 137.102 and had no certificate of registration and education authorizing it to conduct in this state a correspondence school under Chap. 122, par. 17 (a) Ill. Rev. Stats. Defendant says that, since it made these certificates, plaintiff can neither maintain this action nor lawfully conduct its school in this state

and, as a result of this latter fact, the contract is void.

Defendant had the burden of proving plaintiff was doing business in this State without authority so as to come within the Illinois statutes mentioned. Air Conditioning Training Corporation v. Majer. We think the only testimony as to plaintiff's business clearly shows that it was engaged in interstate commerce and that the Illinois statutes had no application. We find, therefore, there is no merit in this contention. Air Conditioning Training Corp. v. Majer.

Defendant had the burden of proving his affirmative defense that fraud induced his signing of the application. The application is in the record. It is a printed document in which the applicant expresses the desire to become a certified Air Conditioning and Refrigeration Technician. In consideration of the payments he offers to make he is to receive from plaintiff the course of home study instruction, with the privilege of post graduate course of two weeks in practice at plaintiff's shop in Youngstown and, among other things, the benefit of a "sincere and conscientious placement service" which will stimulate interest in his employment, and give him references. In large type the application provides that the applicant understands that employment cannot be guaranteed or promised. In large red type it provides as a protection to all the parties that no agreements or promises have been made other than those printed in the application and that the applicant has read the agreement and the red type before signing the application. A questionnaire was answered by defendant apparently in December 1941, which expressed his understanding of various provisions of the agreement he had entered into. In January and August of 1942 and May of 1943, defendant wrote two

and, as a result of this latter fact, the contract is void.

Defendants had the burden of proving plaintiff was doing business in this state without authority so as to be bound which the Illinois statutes restrict. *Air Conditioning Training Corporation v. Kaiser.* We hold the only sensitivity as to plaintiff's business clearly shows that it was engaged in interstate commerce and that the Illinois statutes had no application. We find, therefore, there is no merit to this contention. *Air Conditioning Training Corp.* v. *Kaiser.*

Defendant had the burden of proving his affirmative defense that trial judge had jurisdiction of the nonresident. The application is in the record. It is a printed document in which the nonresident acknowledges the service of summons a written air conditioning and refrigeration Corporation. In consideration of the payments to attorney to make so it to receive from plaintiff the course of home study instruction, with the privilege of such practice course of two years in practice at plaintiff's shop in Kensington and, among other things, the benefit of a "course and consultation planning service" which will stimulate interest in his employment, and give him references. In large type was affirmation providing that the nonresident understands that contract cannot be cancelled or changed. In large red type it provides as a protection to all, in writing that no agreements or promises have been made other than those printed in the application and that the applicant has read the agreement and the red type before signing the application. A verification was notarized by defendant nonresident in December 1961, point displayed his understanding of various provisions of the agreement in fact entered into. In January and August of 1962 and May of 1963, defendant wrote two

letters and his wife, on his behalf, wrote one explaining difficulty in making monthly payments. Plaintiff's representative testified that defendant at no time expressed dissatisfaction with the course.

In meeting the burden of proving fraud, defendant may show material fraudulent verbal statements made before or at the time he signed the application, despite the red-lettered provision in the application, because they would not be merged in the written document. Jones Commentaries on Evidence, 4th Ed. Vol. 2, pp. 826, 827; and Jones v. Minks, 188 Ill. App. 45.

From the testimony of defendant and his wife it appears that plaintiff's representatives told them that defendant would be receiving from $50 to $100 per week in a short time, so that they could buy themselves an automobile and a home; that in a little more than a year he would have a job and even start his own business in Air Conditioning; that although they could not guarantee a job in the contract, they would guarantee him a job after he graduated; and that they had placed many men in employment, some at Stewart Warner and, if defendant did not like it therre, they would place him elsewhere. It further appears that defendant resisted for a while, but his wife was nervous and crying and coaxed him to sign; and that defendant told them he had only a grammer school education and that they promised he would be helped in his studies by a vocational director. This testimony was not met by defense witnesses.

There was introduced in evidence a Cease and Desist order of the United States Federal Trade Commission entered in March 1941. From this order it appears that plaintiff was charged with unlawful practices in the conduct of its business, in that it was deceiving its customers through false representations on radio broadcasts, in its literature and through its solicitors.

letters and his wife, on his behalf, were are negotiating difficulty in making contact personally. Plaintiff's representative testified that defendant is to view arranged discussions with the writer.

In meeting the burden of proving fraud, defendant may show material misleading representations made before or at the time he signed the application, despite the non-liability provision in the application, however they would not be accepted in the written document. Jones Casualty in reliance, 4th Ed. Vol. 2, pp. 656, 657; and Gibson v. Hines, 320 Pa. 400, 18.

From the testimony of defendant and his wife it appears that plaintiff's representatives told them that defendant would be receiving from $50 to $100 per week in a short time, at that they could buy themselves an automobile and a home; that in a little more than a year he would earn a job and have their own business in his specialty; that although they could not guarantee a job in the contract, they would guarantee him a job after he graduated; and that they had placed many men in employment, some of higher course and, if defendant did not like it there, they would close his plumbery. It further appears that defendant resigned for a while, but his wife was nervous and crying and asked him to stay; and that defendant only then he had only a grammar school education and that they considered he would be helped in his studies by a vocational director. This testimony was not met by defense witnesses.

There was introduced in evidence a letter and docket order of the United States District Court dated in March 1941. From this order it appears that plaintiff was charged with material misstatements in the conduct of its business, in that it was deceiving its customers through false representations on radio broadcasts, in its literature and through its solicitors.

The findings of the Commission are recited in the order and among these is one that to qualify for the course of training one would need fundamental knowledge of algebra, chemistry, physical science and electricity, and that several of its customers had not gone beyond 8th grade. We think the introduction of these documents was highly prejudicial to plaintiff's case and requires a reversal of the judgment. The order had no bearing upon the issues in the case. It was not competent to prove any of the facts which defendant had the burden of proving. The fact that it was an order of the Federal Trade Commission unquestionably made a deep impression on the jury.

In aid of a new trial we point out that the court properly admitted testimony of the representations of plaintiff's agents who did not testify at the trial. The evidence of plaintiff's statements to the agents that he had but an 8th grade education, in view of the subject-matter of the course, which we have inspected, was itself sufficient to take to the jury the question whether plaintiff did not deceive defendant by permitting him to sign the application after it received this knowledge of his meagre education.

We further point out that the trial court properly refused to instruct the jury on the question of its failure to comply with the Illinois Statutes mentioned hereinabove. We think the instruction as to the burden of proof of fraud may have been misleading to the jury. It should be clarified. We think the instruction as to false representation should be broad enough to include deceit brought about by the agent's failure to speak, after receiving knowledge of the limited extent of defendant's education. The trial court submitted three forms of verdicts to the jury, one in the event it found for plaintiff on the statement of claim, another in the event it found for defendant

The findings of the Commission are contained in one order and among these is the fact to qualify for the course of studying one would need fundamental knowledge of algebra, geometry, organical science and electricity, and this several of its customers had not gone beyond 8th grade. By giving the introduction of these courses was highly questionable to plaintiff's case and received a reversal of the judgment. The order had no bearing upon the issues in the case. If you had suggested to Jerry one of the facts which defendant had the burden of proving. The fact that it was an order of the Federal Trade Commission unquestionably made a deep impression on the jury.

In aid of a new trial is point out that the court improperly admitted testimony of the representations of plaintiff's agents who did not identify it the trial. The evidence of plaintiff's witnesses to the effect that it had but an 8th grade education, in view of the judgment-maker of the course, which we have indicated, was highly prejudicial if the jury the question whether plaintiff had the security defendant by compelling him to sign the application which at receives this knowledge of his secure education.

We further point out that the trial court improperly refused to instruct the jury on the question of its failure to comply with the Illinois statute contract between. We think the instruction as to the burden of proof of fraud may have been misleading to the jury. It should be clarified. We think the instruction as to their conversations should be broad enough to include fraud based by the agent's failure to speak, after receiving knowledge of the failed return of defendant's solicitation. The trial court submitted three forms of verdicts to the jury, one in the event it found for plaintiff on the statement of claim, another in the event it found for defendant

on the counterclaim and the third in the event it found for neither party. We think there was no place in the case for the third form. The contract was either valid according to plaintiff's theory, or invalid according to defendant's. There was no third possibility.

We believe the verdict on the counterclaim should likewise be reversed. It depended on the same facts and was subject to the same influences as the verdict on the complaint.

For the reasons given the judgment of the Municipal Court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

LEWE, P.J. AND BURKE, J. CONCUR.

on the counterclaim and the third in the e-mail it found for neither party. We think there was no claim in the case for the third term. The contract was either valid according to plaintiff's theory, or invalid according to defendant's. There was no third possibility.

We believe the verdict on the counterclaim should likewise be reversed. It depended on the same facts and was subject to the same infirmities as the verdict on the complaint.

For the reasons given the judgment of the municipal Court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

LEWIS, P.J. AND WHITE, J., CONCUR.

43854 and 43875

SAUL PLAST,

Appellee,

v.

METROPOLITAN TRUST COMPANY, Trustee under Hotel Maryland Liquidation Trust known as Trust No. 1155; BARNET L. ROSSET; LOUIS J. BORINSTEIN and JOHN A. SARGENT; RAYMOND L. REDHEFFER and 900 NORTH RUSH HOTEL CORPORATION, an Illinois corporation, and SAMUEL B. EPSTEIN,

Appellants.

INTERLOCUTORY

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

SAUL PLAST,

Appellee,

v.

METROPOLITAN TRUST COMPANY, Trustee under HOTEL MARYLAND LIQUIDATION TRUST, known as Trust No. 1155; BARNET L. ROSSET, LOUIS J. BORINSTEIN and JOHN A. SARGENT; RAYMOND L. REDHEFFER and 900 NORTH RUSH HOTEL CORPORATION, an Illinois Corporation, and SAMUEL B. EPSTEIN,

Appellants.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

These two appeals from orders denying motions to dissolve the same temporary injunction were consolidated in this court.

The Hotel Maryland was purchased at foreclosure sale for a Bondholders' Protective Committee acting for bondholders of the Hotel. It consisted of a 17 story hotel building at 900 North Rush Street, Chicago. October 15, 1935, the Committee and defendant Trust Co., as Trustee, made an agreement establishing the Hotel Maryland Liquidation Trust. By virtue of this agreement the Hotel property was conveyed to the Trustee and the bondholders became

INTERLOCUTORY

APPEAL FROM

AMERICAN COURT

COOK COUNTY.

SUPREME COURT.

SEPTEMBER TERM, 1928.

MR. JUSTICE DIRKS DELIVERED THE OPINION OF THE COURT.

These two appeals from orders denying motions to dissolve the same temporary injunction were consolidated in this court.

The Hotel Maryland was purchased at foreclosure sale for a Bondholders' Protective Committee acting for bondholders of the Hotel. It consisted of a 17 story hotel building at 900 North Rush Street, Chicago. October 15, 1928, the Committee and defendant Trust Co., as trustee, made an agreement establishing the Hotel Maryland Liquidation Trust. By virtue of this agreement the Hotel property was conveyed to the trustee and the bondholders became

Holders of Certificates of Interest in the Trust. The Trustee took over control and management of the Hotel property the day of the agreement. It operated the Hotel under the direction of three Trust Managers, as provided by the agreement. Distribution of net profits was made to the beneficiaries.

The agreement provided that the trust should terminate "in any event" in ten years. In March 1945 the Trust Managers, defendants Rosset, Borinstein and Sargent sponsored the organization of the 900 North Rush Hotel Corporation. Its directors were Borinstein, Sargent and Redheffer. The purpose was to enable the Corporation to buy and operate the trust property. August 29, 1945, the Trustee notified the beneficiaries of the Trust that the Corporation had been organized and had made an offer of purchase. It notified them that unless holders of 35 per cent or more units objected within 20 days the offer would be accepted. This was a requirement of the Trust agreement. There were 10,216 7/8 units of beneficial interest issued under the agreement. Plaintiff acquired 5 of the units in April 1944.

After receiving notice of the proposed sale, plaintiff obtained a cash offer to buy the hotel property. This offer was transmitted to the Trust Managers September 12 with a demand that it be submitted to the beneficiaries. September 20, 1945, the complaint was filed asking that the proposed sale to the Hotel Corporation be enjoined, that the Trustee and Trust Managers be removed and a receiver be appointed, and for an accounting. Defendants moved without success for a summary judgment. They subsequently filed answers. Plaintiff replied and thereafter moved for a temporary injunction as prayed for in the complaint.

holders of debentures of interest in the Trust. The Trustee took over control and management of the hotel property the day of the agreement. It appointed the hotel under the direction of three Trust Company, as trustee of the agreement. Operation of net profits was made to the debentures.

The agreement provided that the trust should terminate "in any event" in ten years. In March 1934 the trust debentures, debenture bonds, coupons and interest coupons the organization of the 500 North Park Hotel Corporation. Its directors were Rodenbach, Burgess and Ladenheim. The purpose was to enable the Corporation to buy and operate the trust property. August 20, 1934, the Trustee notified the bondholders of the Trust that the Corporation had been organized and had made an offer of purchase. It notified them that unless holders of 75 per cent or more units dissented within 20 days the offer would be accepted. This was a requirement of the Trust Agreement. There were 10,000 7\8 units of beneficial interest issued under the agreement. Plaintiff acquired 9 of the units in April 1944.

After receiving notice of the proposed sale, plaintiff obtained a back offer to buy the hotel property. Its offer was transmitted to the Trust company September 17 with a request that it be submitted to the bondholders. September 20, 1945, the complaint was filed asking that the proposed sale to the Hotel Corporation be enjoined, that the Trustee and Trust Company be removed and a receiver be appointed, and for an accounting. Defendants raised without success for a summary judgment. They subsequently filed answers. Plaintiff replied and thereafter moved for a temporary injunction as prayed for in the complaint.

The injunction issued March 21, 1946. Defendants moved to dissolve on May 4th. Epstein, a holder of 565 units, was given leave to intervene and on June 7 filed his petition to "vacate." June 11 the motion and prayer of the petition were denied. July 8th Hostetler and Jay and Jean Rich, holders of 974 units, were given leave to intervene. They made a motion to dissolve the injunction July 10. The motion was denied. The defendants and Epstein joined in the appeal from the order of June 11th. The other interveners appealed from the order of July 10th.

Plaintiff made a motion in this court to dismiss the appeal. We took the motion with the case. He says that defendants' motion "to vacate" should have been made within 30 days under Chap. 77, Pars. 82, 83 Ill. Rev. Stats. Those provisions refer to final orders, decrees and judgments. This appeal is governed by Sec. 78 of the Civil Practice Act. (Chap. 110, Par. 202, Ill. Rev. Stats. 1945.) There is no limitation of time in that section for filing a motion to dissolve. A motion to dissolve an injunction may be made at any time upon answer. Chap. 69, Sec. 15 Ill. Rev. Stats.; Chicago Title and Trust Co. v. Provel, 282 Ill. App. 173; and Crown Bldg. Corp. v. Monroe Amusement Corp., 326 Ill. App. 430. Plaintiff contends also in support of its motion to dismiss that the grounds urged for the motion to dissolve are identical with those urged on the motion for summary judgment. He argues that, accordingly, defendants are attempting in this appeal to review the unappealable order denying their motion for summary judgment. There could be no objection to defendants using whatever grounds were available to support their motions. The questions for the trial court on each motion were entirely different. The motion to dismiss the appeal is denied.

Plaintiff contends that Epstein has no right to appeal. Plaintiffs' motion to deny Epstein the right to intervene was

The injunction issued March 21, 1944. Defendants moved to dissolve on May 4th. Certain, a holder of 500 units, was given leave to intervene and on June 7 filed its petition to "vacate." June 11 the motion and answer of the petition were denied. July 8th Sanetter and Jay and Jean Ziel, holders of 574 units, were given leave to intervene. They made a motion to dissolve the injunction July 20. The motion was denied. The defendants and Certain joined in the appeal from the order of June 11th. The other intervenors appealed from the order of July 10th.

Plaintiff made a motion in this court to dismiss the appeal. We took the motion with the case. We note that defendants' motion "to vacate" should have been made within 30 days under Chap. 77, Para. 86, Ed 111. Rev. Stats. These provisions refer to final orders, decrees and judgments. This appeal is governed by Sec. 78 of the Civil Practice Act. (Chap. 110, Par. 101, 111. Rev. Stats. 1945.) There is no limitation of time in which motion for filing a motion to dissolve. A motion to dissolve in injunction may be made at any time upon answer. Chap. 69, Par. 21 Ill. Rev. Stats.; Chicago Title and Trust Co. v. Jewel, 328 Ill. App. 172; and Crown Auto. Corp. v. Monroe Improvement Corp., 328 Ill. App. 290. Plaintiff contends also in support of its motion to dismiss that the grounds urged for the motion to dissolve are identical with those urged on the motion for summary judgment. We argue that, accordingly, defendants are attempting in this appeal to review the unappealable order denying their motion for summary judgment. There could be no objection to defendants using whatever grounds were available to support their motions. The questions for the trial court on each motion were entirely different. The motion to dismiss the appeal is denied.

Plaintiff contends that Certain has no right to appeal. Plaintiff's motion to deny Certain the right to intervene was

denied. No cross error is assigned on this ruling. Having been given leave to intervene as a party defendant, he was entitled to appeal from the order denying the prayer of his petition.

There is no dispute about the material facts. The beneficiaries, by express or tacit consent, approved the proposed sale. The dispute arises out of the charge based upon the facts. These charges are that the Trustee and Trust Managers violated their trust by withholding material information from the beneficiaries, thus rendering consents of the latters invalid; that this conduct was in pursuit of a scheme which defendants had adopted to circumvent the mandatory liquidation provision of the agreement, through the use of an amendatory power given to the Trust Managers; and that by virtue of this authority, defendants purported to eliminate from the agreement the requirement that during the last five years of the trust no sale of the property should be made for less than a figure established by an appraisal of the Chicago Real Estate Board. It is charged that the defendants had the ultimate objective of perpetuating themselves in control of the trust property for their own benefit and against the interest of the beneficiaries; and, pursuant to the scheme, violated their trust in failing to submit to the beneficiaries, the cash offer of $550,000, plus, which he had obtained and submitted of the defendants. Defendants denied the charges of fraud or wrongdoing. They insist they followed the terms of the agreement at all times in making the amendments and otherwise, and that their conduct was always in the best interest of the beneficiaries.

The Hotel Corporation offered to assume the liabilities of the trust and deliver $357,590.63 first mortgage income bonds and 10,216 7/8 shares of common stock, being all of the stock of the corporation. It thereafter filed with the S. E. C. as required by the Securities Act, a registration statement, setting forth the terms of the proposed transaction. The statement was declared

denied. No undue error is assigned on this ruling. Having been given leave to intervene as a party defendant, he was entitled to appeal from the order denying the merits of his petition.

There is no dispute about the material facts. The beneficiaries, by express or tacit consent, approved the proposed sale. The dispute arises out of the charge based upon the facts. These charges are that the Trustee and Trust Company violated their trust by withholding material information from the beneficiaries, thus tendering consents of the latters invalid; that this conduct was in pursuit of a scheme which defendants had adopted to circumvent the mandatory liquidation provision of the agreement, through the use of an exculpatory power given to the Trust Company; and that by virtue of this authority, defendants purported to eliminate from the agreement the requirement that during the last five years of the trust no sale of the property should be made for less than a figure established by an appraisal of the Chicago Real Estate Board. It is charged that the defendants had the ultimate objective of appropriating themselves in control of the trust property for their own benefit and against the interest of the beneficiaries; and, pursuant to the scheme, violated their trust in failing to submit to the beneficiaries, the cash offer of 1880,000, plus, which he had obtained and submitted of the defendants. Defendants denied the charges of fraud or wrongdoing. They insist they followed the terms of the agreement in all ways in making the amendments and otherwise, and that their conduct was always in the best interests of the beneficiaries.

The Estate Corporation offered to assume the liabilities of the trust and deliver 6887,000.00 first mortgage income bonds and 10,312 7/8 shares of common stock, being all of the stock of the corporation. It thereafter filed with the S. E. C. as required by the securities act, a registration statement, setting forth the terms of the proposed transaction. The statement was declared

effective August 22nd.

Defendants' answer states that holders of only 1209 units of the more than 10,000 outstanding, objected within the 20 days and that on September 21 they executed instruments of conveyance of the trust property and received the securities from the Hotel Corporation; that they refused to submit the cash offer obtained by plaintiff because it was grossly inadequate in view of an appraisal of the property made in April 1945 of $800,000; and that the amendments were made pursuant to the requirements of the S. E. C. whose experts disagreed with the appraisal and considered that the figure would mislead beneficiaries as to the value of those certificates. It avers the making of the amendments, and set forth a resolution, providing for the same, finding that the amendments did not adversely affect to a material degree substantial rights of the beneficiaries. This finding under the agreement obviated the necessity of submitting the amendments to the beneficiaries for approval. It states that the transaction was sound because at the time the real estate market clearly showed the wisdom of retaining real estate of proved earning ability and they repeated their confidence in their judgment and their compliance with the terms of the agreement and conduct consistent with their trust.

In reply the plaintiff charges that the judgment of the defendants was insufficient to override the mandatory liquidation provision or to justify withholding essential information and the cash offer from the beneficiaries. He charges that acts done after the filing of his complaint were nullities tainted with fraud. In his complaint he had charged defendants with a failure to have the appraisal made. In reply he charges wrongdoing in

effective August 23d.

Defendants' answer states that minors of only 1000 units of the more than 10,000 subscribers, returned within the 10 days and that on Saturday, 23 days subsequent instructions of acceptance of the trust property and received the securities from the Hotel Corporation; that they refused to submit the cash offer obtained by plaintiff because it was grossly inadequate in view of an appraisal of the property made in April 1919 of $500,000; and that the securities were made payable to the trustees of the E. S. C. whose square dissatisfied with the appraisal and considered that the figure could without benefiteries as to the value of those certificates. It avers the making of the assessments and set forth a resolution, providing for the same, finding that the assessments did not adversely affect to a material degree substantial rights of the beneficiaries. This finding under the agreement obviated the necessity of submitting the assessments to the beneficiaries for approval. It avers that the transaction was sound because at the time the real estate market clearly showed the wisdom of retaining real estate of proved earning ability and they reposed their confidence in their judgment and their compliance with the terms of the agreement and subject contained with their trust.

In reply the plaintiff charges that the judgment of the defendants was insufficient to justify the mandatory liquidation provision or to justify withholding essential information and the cash offer from the beneficiaries. He charges that his case after the filing of his complaint were initiated with fraud. In his complaint he had charged defendants with a failure to have the appraisal made. In reply he charges wrongdoing in

withholding notice of the appraisal now admitted. He avers that the consents given were invalid because of the information withheld, and that the cash offer was withheld to further the scheme and not because it was inadequate. He denies that the S. E. C. required the amendment or that it had the power to do so, or the power to direct defendant to withhold information and denies that the statement was filed with the S. E. C. in interest of the beneficiaries.

Pursuant to plaintiff's motion, the injunction issued March 21 to restrain the defendants from carrying out the proposed plan or doing any act calculated or intended to carry out the plan; from making the exchange of securities pursuant to the plan; and from doing any act calculated or intended to disturb the status quo of September 20, 1945.

The motions to dissolve were grounded substantially on the matters of defense already outlined. Additional grounds urged, however, were that after the conveyance and delivery of the Hotel Corporation securities, the trustee proceeded to allocate the securities among the beneficiaries and on March 13, having completed the task, wrote the beneficiaries to submit their certificates for exchange either for bonds or stock, or for participation certificates in a voting trust; that on March 21st the trustee had received certificates representing 4,739 3/8 units and had effected exchanges therefor; and that since the issuance of the injunction had received certificates representing 1520 units. The motion charged laches on the part of plaintiff in view of the knowledge given him in the affidavit filed before the summary judgment proceeding and his failure to act since; that the transaction was consummated; that because of the progress in working out the details of the transaction, the injunction has

withholding notice of the proposed new issuing. He avers that the consents given were invalid because of the interpretation withheld, and that the said offer was without a to renewer the issues and not because it was inadequate. He denies that the S. E. C. required the amendment or that it had the power to do so, or the power to direct defendant to withhold information and denies that the statement was filed with the S. E. C. in behalf of the beneficiaries.

Pursuant to plaintiff's motion, the injunction issued March 27 to restrain the defendants from carrying out the proposed plan or doing any act calculated or intended to carry out the plan; from making the exchange of securities pursuant to the plan; and from doing any act calculated or intended to obstruct the fiduciary duty of defendant SC, Inc.

The actions to dissolve were grounded substantially on the matters of fairness already stated. Additional grounds urged, however, were that after the conveyance and delivery of the Total Corporation securities, the trustee proceeded to allowing the securities among the beneficiaries and on March 13, having completed the task, wrote the beneficiaries to submit their certificates for exchange either for bonds or stock, or for participation certificates in a voting trust; that on March 21st the trustee had received certificates representing 4,750 3/4 units and had effected exchanges therefor; and that since the issuance of the injunction had received certificates representing 1,480 units. The motion charged laches on the part of plaintiff in view of the knowledge given him in the affidavit filed before the summary judgment proceeding and his failure to set aside; that the transaction was consummated; that because of the progress in working out the details of the transaction, the injunction has

prejudiced the beneficiary; and that the beneficiaries, both those who have exchanged and those whose exchange is pending, were prejudiced.

The petitions of the interveners pointed out the highly profitable nature of the Hotel business; that any liquidation under the trust agreement would deprive them of the benefits of that investment; that Epstein was a consenting beneficiary who had received securities of the Hotel Corporation but was prevented by the injunction from full benefits of the exchange; and that the other interveners had deposited their certificates of beneficial interest, but by virtue of the restraint were unable to receive Hotel securities in exchange.

Defendants contend that the plaintiff was precluded from the interlocutory relief because of laches and that the injunction should not have issued inasmuch as the principal relief sought could not be had. Defendants sent the circular letter August 31st. There were 20 days thereafter within which beneficiaries could object. The letter notified the beneficiaries that, unless more than 35% objected, the sale would be made. Plaintiff received a letter. He filed his suit on the 20th day. This was the last day for filing objections. October 15th plaintiff was given notice by the summary judgment affidavit that the sale had been consummated and defendants proposed to commence carrying out the details. March 13 defendant sent a circular letter out announcing their readiness to make the exchange of securities. During all of this time plaintiff made no move to obtain the interlocutory order. It is true that in the interim each side filed pleadings. This has no bearing on this point. Had plaintiff moved with dispatch after the filing of the summary judgment affidavit, he would have been in position to prevent defendants from going further than the delivery of conveyances, and acceptance of the securities from the Hotel Corporation.

prejudiced the beneficiary; and that the beneficiaries, with whom who have exchanged and those whose exchange is pending, were prejudiced.

The petitions of the intervenors pointed out the highly profitable nature of the Hotel business; that any liquidation under the trust agreement would deprive them of the benefits of that investment; that Quinlan was a commercial beneficiary who had received securities of the Hotel Corporation but was prevented by the injunction from full benefits of the business; and that the other intervenors had described their certificates of beneficial interest, but by virtue of the restraint were unable to receive Hotel securities in exchange.

Defendants contend that the plaintiff was precluded from the interlocutory relief because of laches and that the injunction should not have lasted longer as the original relief sought could not be had. Defendants sent his circular letter August 21st. There was 30 days thereafter within which beneficiaries could object. The letter notified the beneficiaries that, unless more than 100 objected, the sale would be made. Plaintiff received a letter. He filed his suit on the 30th day. This was the last day for filing objections. October 11th plaintiff was given notice by the summary judgment affidavit that the sale had been consummated and defendants proposed to continue carrying out the details. March 13 defendant sent a circular letter out announcing their readiness to make the exchange of securities. During all of this time plaintiff made no move to obtain the interlocutory order. It is true that in the interim each side filed pleadings. This has no bearing on this point. But plaintiff moved with diligence after the filing of the summary judgment affidavit. He would have been in position to prevent defendants from going further than the delivery of conveyances, and acceptance of the securities from the Hotel Corporation.

What transpired after September 20th might not have appeared to the trial court when the injunctional order was entered. The motion to dissolve, however, brought it to the attention of the court. On March 21st when the order was entered, nearly one half of the certificates of beneficial interest had been exchanged for the Hotel securities and 1500 more units had been received by the Trustee for exchange. This information presented a basis for the trial court to correct its action if the injunctional order had been entered improvidently.

The defendants proceeded with their plan in the face of plaintiff's complaint. They were free to do so. They knew that, should plaintiff succeed, their acts would be nullified. Plaintiff knowing their attitude and advised of their acts and purposes, stood by.

The object of a temporary injunction is to preserve the status quo should plaintiff's showing warrant the order. Finn v. Evang. Lutheran Church, 68 N. E. (2nd) 541. The injunction purported to restrain the doing of acts already done; to restrain a conveyance made months before; to restrain exchanging the securities when more than one half had either been exchanged or submitted for exchange; and to preserve a status quo which existed prior to all of this. Obviously, the main purpose of the injunctional order could not be attained.

The transaction is in a confused state. The confusion was brought about by plaintiff's undue delay and the injunction. Defendants took the chance that their various steps would be nullified. Their pleadings indicate a desire to complete the details of the transaction. The record does not bear out plaintiff's contention that his suit is a class suit. It merely invited others of his class to join with him.

That unauthorized other transfers took place did not have occurred to the trial court when the injunctional order was entered. The motion to dissolve, however, brought it to the attention of the court. On hard fight upon the order was entered, nearly one half of the certificates of beneficial interest had been exchanged for the total securities and 1000 more units had been received by the Trustee for exchange. This information prompted a basis for the trial court to correct its action if the injunctional order had been entered inadvertently.

The defendants proceeded with their plan in the face of plaintiff's complaint. They were free to do so. They were then, should plaintiff succeed, their acts would be qualified. Plaintiff knowing their attitude and advised of their acts and purposes, stood by.

The object of a temporary injunction is to preserve the status quo should plaintiff's showing warrant the order. Tim v. Lewis, Lawyers Corpn, 88 S. W. (2d) 69. The injunction purported to restrain the claim of note already done; to maintain a conference made months before; to restrain exchanging the securities when more than one half had either been exchanged or submitted for exchange; and to preserve a status quo which existed prior to all of this. Obviously, the main purpose of the injunctional order could not be attained.

The transaction is in a contested state. The controversy was brought about by plaintiff's undue delay put the injunction. Defendants took the course that their various steps could be qualified. Their planning indicate a desire to conceal the details of the transaction. The record does not bear out plaintiff's contention that his suit is a class suit. It merely invited others of his class to join with him.

We need not consider whether the court in entering the injunctional order correctly applied the probability rule announced in Mayer v. Collins, 263 Ill. App. 219. We believe that the trial court should have granted the motion to dissolve the injunction. We see no reason why the order should stand under all the circumstances of this case. We hold that the trial court abused its discretion in entering the order. The order is, therefore, reversed.

ORDER REVERSED.

LEWE, P.J. AND BURKE, J. CONCUR.

We need not consider whether the court in entering the injunctional order correctly applied the probability rule announced in Davis v. Collins, 201 Ill. App. 518. We believe that the trial court should have granted the motion to dissolve the injunction. We see no reason why the order should stand under all the circumstances of this case. We hold that the trial court abused its discretion in entering the order. The order is, therefore, reversed.

Order reversed.

LEWIS, P.J., and SCANLAN, J., concur.

Abstract

No. 10080 Agenda No. 3

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

May Term, A. D. 1946

KATE M. DUKES,
Appellant,

vs.

SPURGEON MERCANTILE COMPANY,
an Illinois Corporation,
Appellee

Appeal from
Circuit Court
LaSalle County.

Bristow, J.

This is an appeal from a judgment entered by the Circuit Court of LaSalle County in favor of the defendant, Spurgeon Mercantile Company, an Illinois corporation, in an action of forcible detainer brought by the plaintiff, Kate M. Dukes, to secure possession of certain leased premises.

The salient facts appearing from the record of the proceedings held before the trial court without a jury indicate that plaintiff is the owner of the disputed premises--the first floor and basement of a building located in Mendota, Illinois, and that on or about July10, 1933, plaintiff leased the premises to defendant for a period of ten and a half years commencing September 1, 1933 and extending until March 1, 1944.

This lease provided that the lessee would make certain improvements amounting to not less than $1,500, which improvements were to become the property of the lessor, and, in consideration thereof, the lessee was granted the "option of cancelling this lease at the end of the first five years, or extending this lease for an additional period of five years at the same terms and rental." It is this latter clause, and the proper interpretation thereof, that constitutes the basis of this litigation.

It appears further that defendant entered possession of the premises, and, on September 22, 1943, approximately five and a half months prior to the expiration of the original 10½ year term, defendant notified plaintiff, by letter of its intention to exercise the option to extend the lease for an additional five year period extending from March 1, 1944 to March 1, 1949.

Plaintiff replied, in substance, that she would not recognize defendant's right to exercise the option at this time, for, under the terms of the lease, defendant was obliged to exercise that option only within the first five years of the term. Inasmuch as defendant had not done so, plaintiff insisted that defendant's right to the premises terminated on March 1, 1944. Notwithstanding plaintiff's reply, defendant delivered a further notice dated Nov. 18, 1943 reaffirming its exercise of the aforesaid option, and, upon the expiration of the original term, March 1, 1944, defendant remained in possession and tendered to plaintiff the same rental each month up to the present time. Plaintiff, in turn, cashed the checks down to and including the month of November, but with notice to defendant that she did not accept such checks in full payment.

Upon failure of plaintiff to initiate proceedings to adjudicate the dispute, defendant filed suit in the federal court for a declaratory judgment on the rights of the parties under the lease. The court in that proceeding suggested in a pre-trial conference that the issue should properly be determined by a local court in forcible detainer proceedings, whereupon plaintiff instituted the instant case, and the declaratory judgment proceedings were continued pending the determination of this litigation.

At the hearing before the trial court without a jury, plaintiff urged that under the terms of the lease defendant was obliged to exercise the option to extend the lease beyond the 10½ year term, at the end of the first five years, and that inasmuch as

defendant had not complied therewith, plaintiff, as owner of the premises, was entitled to possession as of March 1, 1944. Defendant, however, argued that it was entitled to exercise the option to extend the lease any time prior to the expiration of the 10½ years, and that notice of its intention to exercise the said option given to plaintiff 5½ months before the end of the original term constituted a compliance with the lease. Both parties offered oral testimony substantiating their respective conflicting interpretations, and, on the basis of that testimony and upon due analysis of the terms of the lease, the trial court held that defendant was entitled to possession of the premises. From this judgment, plaintiff has appealed.

The sole issue before this court is whether under the provisions of the lease, the defendant lessee was required to give notice to the plaintiff of its intention to exercise the option to extend the lease 5½ years prior to the termination of the lease.

The established canons of construction of leases are that the court must first ascertain from the lease itself the nature and terms of the contract and the rights and duties created thereby. If the language of the lease is clear, proof aliunde cannot be heard to contradict or vary its terms, or give it a meaning inconsistent with the language used. If, however, the lease contains inconsistent or ambiguous clauses, capable of two distinct interpretations, the court is authorized to permit oral testimony to explain the expressed intention of the parties. In no case, however, is it the province of the court to make a new contract for the parties or to supply a material stipulation. 35 Corpus Juris, 1176; Ross v. Grichel, 136 Ill. App. 599; Bloomington Opera House v. Schoenhofen Brewery, 171 Ill. App. 7; Williams v. Gottschalk, 231 Ill. 175; Diederich v. Ross, 228 Ill. 610.

In the instant case the controverted provision stated: "In recognition of the fact that the second party is spending a

large sum of money for new equipment and betterment of the property, and immediately relinquishing to first party all claim whatsoever on same; it is hereby agreed and understood that party of the second part has the option of cancelling this lease at the end of the first five years, or extending this lease for an additional period of five years at the same terms and rental."

The legitimate interpretation of the foregoing provision is that the lessee is granted two distinct options as consideration for his expenditures for the improvement of the lessor's property. The first option is to cancel this 10½ year lease at the end of the first five years. The words "at the end of the first five years" refer to a period of duration rather than a particular date that the lessee is given the privilege of converting this 10½ year lease into a five year lease. From all that appears in this lease, this option may be exercised at any time during this five year period, for no reference is made to the matter of giving notice to the lessor on or within any specified date.

The second option, set forth in the second clause, gives the lessee the privilege of "extending this lease" (again referring to the 10½ year lease) "for an additional period of five years at the same terms and rental." Here again no reference is made to a date for giving notice of intention to exercise this extension option, and from the terms of this provision the option might properly be exercised at any time within the duration of the 10½ year term.

Plaintiff contends, however, that inasmuch as the cancellation option must necessarily be exercised within the first five years, since it involves cancelling the remainder of the term, therefore, the extension option, which is stated in the alternative, must also be exercised within the first five years, notwithstanding the fact that this option can not take effect until the expiration of the 10½ year term.

This interpretation is not warranted by the plain language of the lease, nor by the canons of construction, nor the preponderance of evidence submitted before the trial court.

It is apparent that phrasing the two options in the alternative in one sentence is a natural mode of expressing two distinct rights, only one of which can be exercised, and the mere juxtaposition of the clauses in no way indicates that the two options, which would take effect in operation 5½ years apart, must be exercised at the same time. This is particularly evident since no reference is made to a date on or within which notice must be given of the exercise of either option.

To sustain plaintiff's interpretation, the court must add the words, "elect at that time to exercise" to precede and qualify the option to extend the lease, so that the provision would be made to read: "The option of cancelling this lease at the end of the first five years or elect at that time to exercise the option of extending this lease for an additional period of five years."

Under the aforementioned recognized principles for construing leases, the court is not authorized to make a new contract for the parties, nor to supply material stipulations under the guise of construing the intention of the parties.

Plaintiff, however, in reliance on the case of Hedrich v. United States Brewing Co., 205 Ill. App. 266, argues that there is a patent ambiguity in the lease, and therefore, this court should not only permit oral testimony to explain the ambiguity, but in the process of construction should supplythe words necessary to sustain plaintiff's interpretations.

The Hedrich case, supra, however, is clearly distinguishable from the instant case. In that case, clause 6 of the lease in question related to the issuance of a saloon license, and gave a right ~~tx~~ of termination to the lessee in case the city should refuse such a license; clause 9, which related to damage or destruction by fire, gave a right of termination in case of lessor's fail-

ure to repair; and at the end of clause 9 there was a sentence which, standing alone, gave the lessee an unconditional right to cancel the lease on giving ten days notice. This provision, if given effect, would make clauses 6 and 9 superfluous; therefore, the court held, without recourse to evidence aliunde, that all the provisions of the lease must be construed together and that the only reasonable construction was that the lessee might terminate the lease on the 10 day's notice in case of lessor's failure to repair after a fire.

In the instant case there are neither inconsistent pro visions, nor patent ambiguities, and the addition of the words "elect at that time to exercise" is not only without justification but imports a meaning different from that appearing on the face of the lease.

Plaintiff further relies on the Hedrich case, supra, to support her earnest contention that the disputed provision should be given a construction least favorable to the defendant since it appears that its officers drafted the lease.

In the Hedrich case, the court enunciated the general principle that, "doubtful, ambiguous or inconsistent reservations or conditions inserted therein will be given a construction least favorable to the party drafting same," but it is apparent, from even a cursory analysis, that this dictum has no application to the case at bar, for the expressed intention of the parties is clear; whereas, in the Hedrich case the lease would have been rendered a nullity unless the court construed the instrument as a whole so as to give meaning to all of the inconsistent provisions.

Moreover, the dictum of the court, on which plaintiff apparently relies, is controverted by an equally well established rule of construction reiterated by the court in Launtz v. Kinloch Telephone Co., 239 Ill. App. 204; "As a general rule in construing the provisions of leases relating to renewals, where there is any ambiguity, the tenant is favored and not the landlord, because

the latter, having the power of stipulation in his own favor has neglected to do so, and also upon the principle that every man's grant is to be taken most strongly against himself." In the case at bar, however, this court need not have recourse to either of these general rules, inasmuch as the disputed provision of the lease is neither doubtful nor ambiguous.

Furthermore, it cannot be contended that the mere omission of the date for giving notice of the exercise of each option creates an ambiguity which would warrant the court to add words to the lease, for the absence of notice provisions is common in the case lore, and it is uniformly held that no notice is necessary, or, at most, notice any time before the termination of the term. 32 American Jurisprudence 820; Gusack v. Gunning System, 109 Ill. App. 588; 35 Corpus Juris 1018, 1021.

It is the opinion of this court, furthermore, that plaintiff's contention that the lease required defendant to give notice of its intention to extend the lease 5½ years prior to the expiration of the 10½ year term, is not only inconsistent with the language of the lease, but is manifestly unreasonable and contrary to business practices. Such a requirement would be wholly lacking in the purpose for which notices are ordinarily provided, namely, to give the lessor a reasonable opportunity to relet or otherwise provide for the use of the building.

The only evidence appearing in the record in support of such an interpretation is plaintiff's oral testimony of her admittedly dim recollection of the surrounding circumstances and of the terms of the agreement prior to its being reduced to writing. Inasmuch as this evidence is contradictory to the express language of the lease, it is inadmissable under the established rules of evidence prohibiting oral testimony to contradict the terms of a sealed instrument.

In Ross v. Grisbel, 136 Ill. App. 399, where the lease omitted certain agreements concerning repairs and installations

and proof was offered of a preexisting or contemporaneous verbal contract, the court stated, "All contracts in some sense are verbal contracts before being reduced to writing. Their terms and conditions must be talked over and agreed upon but when parties have reached an understanding and embodied their agreement in an instrument under seal that instrument must be, not only the sole evidence of their contract, but, in the absence of fraud or mistake, no parol agreement antecedent to, contemporaneous with, or subsequent to its making can be used to vary, extend, or modify any of the essential features or extend the liability of any of the parties thereto."

Similarly, in Bloomington Opera House v. Schoenhofen Brewery, Supra, the court held inadmissible certain correspondence to show that the ~~mk~~ clause of the lease, which stated that if the city should not grant a license for a drug shop the lessee might cancel the lease, had reference only to the situation where the city might become dry territory. The court stated, ". . . the lease itself must be held to be the contract and not the correspondence or conversations that took place prior to its execution."

In the instant case, even if this court were to take cognizance of plaintiff's testimony, it appears that her statements were contradicted by the testimony of the president of the defendant corporation. The trial court heard and weighed all the conflicting evidence, and from the nature of its order, necessarily found the preponderance of evidence in favor of the defendant. Unless this finding is manifestly contrary to the weight of the evidence, the appellate court will not substitute its judgment for that of the trial court. For it is the province of that court to determine the credibility of witnesses and the weight of their testimony where evidence is conflicting.

On the basis of the foregoing analysis, it is the considered judgment of this court that the defendant-lessee was not required, under the terms of the lease, to give plaintiff-lessor

notice of its intention to exercise the extension option of the lease 5½ years prior to the expiration of the original term, and that defendant was properly entitled to exercise the option at any time within the 10½ year period ~~as~~ prescribed by the lease. Therefore, defendant's notification submitted on September 28, 1943, 5½ months to the termination of the original term, was in compliance with the provisions of the lease, and defendant is properly entitled to the premises for the additional period extending March 1, 1944 to March 1, 1949. The judgment of the trial court should, and is hereby affirmed.

JUDGMENT AFFIRMED.

43788

MARY BURCH,
Appellee,

v.

WILL HICKMAN and MARGARET HICKMAN, also known as MARGARET WILSON,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

3301.A.155

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

March 18, 1946, plaintiff brought an action of forcible detainer against defendants to recover possession of the third floor apartment of the building known as 6035 So. St. Lawrence avenue, Chicago, charging in the complaint that the lease between the parties was terminated because of substantial violations of the written provisions of the lease. On the trial before judge and jury all of the claimed violations of the provisions of the lease were waived except that defendants were conducting a rooming house having a number of roomers, contrary to the provisions of the lease. There was a verdict and judgment in plaintiff's favor and defendants prosecute this appeal.

The record discloses that on May 1, 1941, plaintiff leased the apartment in question, to the defendant, Will Hickman, for a term of one year, (who took possession on that date) and thereafter executed like leases on May 1, 1942 and May 1, 1943; that the period covered by the latter lease terminated April 30, 1944, but that Hickman continued in possession of the apartment and is still in possession. The lease expiring April 30, 1944, provided that the apartment should be used by the lessee "for a private dwelling" at a rental of $70 per month. The fourth paragraph of the lease, in small printing, provides: "4. USE OF PREMISES - Said premises, or any part thereof, shall not be used or occupied for boarding or lodging house, nor for

rooming" purposes. By paragraph 16 of the lease it is provided: "LESSOR'S RIGHTS AFFECTED ONLY BY WRITTEN WAIVER - The acceptance of rent after it falls due, or after knowledge of any breach hereof by Lessee, or the giving of any notice or making any demand, whether according to any statutory provision or not, or any other act or waiver other than written waiver shall not be construed as a waiver of Lessor's right to act without notice or demand or of any other right hereby given Lessor, or as an election not to proceed under the provisions of this lease."

February 21, 1946, plaintiff caused to be served on defendants a written "Notice to Discontinue Violations of Tenancy and to Cease Nuisances," in which it was stated that defendants had breached the tenancy for the reason that "You are renting rooms in said premises to certain parties and thereby conducting a rooming business therein," and that the apartment was to be used by the tenant as a private dwelling but was now also occupied by other eight named persons "who are presumably roomers." It also alleged other violations of the lease which are not involved, since as stated above, on the hearing, they were all waived by counsel for plaintiff, except the one with reference to the keeping of roomers. The notice further stated that if the defendants wholly failed to discontinue the keeping of roomers within ten days the lease would be terminated.

More than ten days thereafter, viz., March 4, 1946, a notice of termination of the tenancy was served by plaintiff on defendants, the termination to take effect March 16, 1946. The tenants, having failed to cease keeping roomers on March 18, the instant case was brought.

Plaintiff, in her own behalf, testified that the defendants were still occupying the apartment and that she had not

mounting" nonsense. If paragraph 15 of the lease is to mean that "LESSOR'S RIGHTS AFFECTED ONLY IN VIOLATION BRIDGE - the exception of that after it still does, or after breaches of any lease, or the giving of any notice or making any demand, whether according to any electricity provision or, or any other act or policy other than written notice shall not be construed as a waiver of lessor's right to act without notice or demand or of any other right having given lessor, or as an waiver on not to permit make the provisions of this lease."

Tenancy 22, 1966, plaintiff asked to be served on defendants a written "Notice to terminate violations of Tenancy and to Lease Obligations." It said in my claim that defendants had violated the tenancy for the reason that "you are making noise in said premises to annoy disturb and thereby constituting a nuisance therein." not that the apartment was to be used for the purpose as a private dwelling but was also occupied by other other adult persons "who are unmarried tenants." It also alleged other violations of the lease which are not material, which as stated above, or the pending, that were all waived by tenant for plaintiff, except the one with reference to the matter of tenants. The notice further stated that if the defendants really failed to discontinue the keeping of tenants within two days the lease would be terminated.

Now then on June twenty-two, 1966, being 4, 1966, a notice of termination of the tenancy was served by plaintiff on defendants, the same being to take effect August 1, 1966. The tenants, during failed to cease keeping tenants in spite of the instant case was brought.

Plaintiff, in her own behalf, testified that the defendants were still occupying the apartment and that she had not

given permission to either of defendants to operate a rooming house in the apartment. On cross examination she testified that she knew all along, since 1941, that defendant was keeping roomers in the apartment.

Margaret Wilson, who was named as one of the defendants, testified that she was the manager of the apartment for defendant, Hickman; that she had known plaintiff since 1941 - saw her almost daily since that time; that defendant, Will Hickman, had several roomers in the apartment; that in 1941 plaintiff told the witness that "when my rooms were rented to let her know, as she wanted some roomers, and I sent her some roomers and she accepted them." That during all the time since 1941 there were roomers in the apartment.

Defendant, Hickman, testified that he was the tenant of the apartment and had been since 1941; that he had rented the apartment continuously since 1941 but that plaintiff had never objected to his having roomers. During the cross examination, as to whether the witness had talked to plaintiff about keeping roomers, the court said: "It doesn't make any difference. She knew all through the years he was renting rooms. She didn't object."

In Vintaloro v. Pappas, 228 Ill. App. 182, affirmed by the Supreme court in 310 Ill. 115, it was held that the receipt by the lessor of rent accruing subsequent to a breach of the conditions of the lease, with knowledge of the fact, is a waiver of the right to declare a forfeiture for such breach except where the rule is qualified by the language of the lease or the special circumstances of the case. And in Famous Permanent Wave Shops, Inc., v. Smith, 302 Ill. App. 178, it was held that where the landlord had accepted rent after it became due, by the terms of the lease, it was the duty of the landlord to notify the lessee of his intention to insist upon strict compliance of

given permission to enter or attempt to remove a trespasser from the apartment. In every examination she (as Lily) tries the key all alone, since [illegible], that defendant was keeping tenants in the apartment.

Bernard Tilton, who was asked by one of the defendants, testified that she was the manager of the apartment for defendant Hickman; that she had been stationed alone [illegible] - she was alone daily since that time; that [illegible]. (3) Plaintiff, who arrived moving in the apartment; that on [illegible] of August told the witness that "when my rooms were rented to let her come, as she wished some tenants, and I told her that [illegible] there." That [illegible] all the [illegible] there were tenants in the apartment.

Defendant, Hickman, testified [illegible] the lease [illegible] the apartment and had been alone [illegible]; when he was [illegible] apartment occasionally alone [illegible] plaintiff had never objected to his having tenants. [illegible] on cross examination, he to elicit the witness's [illegible] plaintiff about [illegible] room [illegible], the [illegible] said: "It doesn't make me difference. She knew all I [illegible] the [illegible] room. The [illegible] objected."

In [illegible] v. [illegible], [illegible] (1[illegible]), [illegible] the Supreme Court in [illegible] T.L. [illegible], it was held that the [illegible] by the [illegible] of such [illegible] [illegible] in a [illegible] of the conditions of the lease, with [illegible] of the [illegible], is a [illegible] of the right to [illegible] a [illegible] [illegible] where the [illegible] is justified by the [illegible] of the lease or the general circumstances of the case. And in [illegible] [illegible], [illegible] v. [illegible], [illegible] (1[illegible]), it was held that where the landlord and [illegible] [illegible] after it became due, in the terms of the lease, it was the duty of the landlord to notify the lessee of his intention to insist upon strict conditions of

the lease as written, before he could declare a forfeit. See also Craft v. Calmeyer, 274 Ill. App. 296; Fisher v. Mich. Sq. Bldg. Corp., 328 Ill. App. 143. This has long been the settled law in this state.

In the instant case, plaintiff, having known that defendant was keeping roomers in the apartment for many years contrary to the provisions of the lease, waived the right to forfeit the lease until and unless she gave notice that she would insist upon the terms of the written lease, which was done in the instant case.

A number of other points are made in the brief of counsel for defendants but we think they are not sufficient to disturb the judgment of the trial court.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Niemeyer, J., and Feinberg, J., concur.

the lease as written, before he could declare a forfeit. See also Gould v. Lawrence, 276 Ill. App. 209; Kelly v. Cole, 94 Ill. App. 500 (Ill. App. 1900). This was long been the settled law in this state.

In our opinion the, chancellor, having found that defendant was keeping vacant in the expectation of being paid money by the provisions of the lease, denied the right to forfeit the lease until and unless he gave notice that he would insist upon the terms of the original lease, which he done in the instant case.

A number of other points are made by the point of counsel for defendants but we think they are not material to dispose the judgment of the trial court.

The judgment of the municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Burke, J., and Friedman, J., concur.

43881

S. C. LURIE, Appellant, v. WILLIAM H. WATSON, JESSIE WATSON and ANNA W. ADAMS, Appellees.	APPEAL FROM SUPERIOR COURT, OF COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiff seeks to reverse a decree entered by the Superior court of Cook county dismissing his creditor's bill for want of equity.

January 26, 1946, plaintiff, as assignee of judgments, filed a creditor's bill praying that the warranty deed from defendants, William H. Watson and Jessie Watson, his wife, dated November 14, 1931, conveying the property to defendant, Anna W. Adams, be declared null and void and that the property be subjected to the payment of the judgments entered against William and Jessie Watson aggregating $900, on account of their stock ownership in the West Englewood Trust & Savings Bank. Plaintiff also sought to subject other assets which he claimed belonged to the judgment debtors. There was a hearing before the chancellor and, as stated, a decree entered dismissing the complaint for want of equity.

The record discloses that on June 9, 1931, defendants, Mr. and Mrs. Watson, were stockholders of the West Englewood Trust & Savings Bank which closed on that day and never reopened for business. On the next day a creditors' suit was filed against the stockholders of the bank to enforce their superadded constitutional liability. November 14, 1931, the Watsons executed their warranty deed conveying a certain improved lot in Chicago to defendant, Adams, "subject to encumbrance of record and to taxes and assessments due after date hereof," Nearly

three years after the suit was filed, viz., June 28, 1934, a decree was entered that the Watsons were liable for $900. October 8, 1941, the judgments were revived and June 7, 1945, the receiver of the bank assigned the judgments to plaintiff. What he paid for them does not appear.

On the hearing plaintiff called a witness who was in the real estate business who testified that he examined the real estate in question on the day before he testified, which was June 24, 1946, and gave as his opinion, that the property, when it was conveyed November 14, 1931, by the Watsons to Adams, was worth $8,000; that he examined the building only from the outside because he was refused admittance.

George M. Fisher, a lawyer who represented defendants in the transfer of the property and who for many years lived in the neighborhood where the property was located, at 6100 South Bishop Street, Chicago, testified that he had been engaged in the building construction business and buying and selling real estate in the neighborhood; that he had built 36 buildings in the immediate neighborhood and sold them; that he handled many real estate transactions for his clients at that time and was familiar with the valuations in the neighborhood; that in his opinion the property in question, improved by a story and a half building, was worth about $5,000 and that the valuation put on the building by the witness called by plaintiff, was grossly excessive.

After the transactions above mentioned and before the hearing, George M. Fisher was elected and is now serving as a judge of the Superior court of Cook county.

The evidence is further to the effect that defendant, Anna W. Adams, was a sister of defendant William H. Watson and lived at Port Huron, Michigan, except for a few years when she lived in Chicago. At or about the time of the conveyance of the

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three years after the suit is filed, viz., June 5, 1924, a decree was entered that the bonds were liable for 100%. October 5, 1942, the judgment was reversed and once 7, 1942, the receiver of the bond holders for judgment is plaintiff. that be paid for that bond not appear.

On the hearing plaintiff called a witness, who was in the real estate business and testified that he produced the real estate is question on the day which he testified, which was June 24, 1938, and gave as the reason, that the property, when it was acquired December 1, 1921, by the owners to whom was worth $3,000: that he estimated the building only from the outside because he was not allowed entrance.

George E. Fisher, a lawyer and [illegible] in the ownership of the property one for two years [illegible] in the neighborhood where the property was located, is [illegible] Wabash street, witness, testified that he has been engaged in the building operation [illegible] real estate in the neighborhood; that he has built in the immediate neighborhood and knows; and is familiar with real estate transactions for [illegible] of that kind and was familiar with the values in the neighborhood; that in his opinion the property in question, consisting of a store and a half building, was worth about $3,000 and that the valuation put on the building by the witness Miller is ridiculous, was grossly exorbitant.

After the testimony was heard arguments and before the bench, George E. Fisher was recalled and in his rulings as a judge of the superior court of last court.

The evidence is further to the effect that defendant, Adam T. Lowe, was a minor of [illegible] [illegible] T. Lowe and lived at Fort Wayne, Indiana, except for a few years when he lived in Chicago. At or about the time of the commencement of the

property in 1931 she gave her brother $450 and afterward $800 or $900, and the record shows that there was a mortgage on the property at the time, of $2,500, which she afterward paid off in installments. There is in the record an exhibit-an extension agreement dated September 22, 1932, executed by John Grimm and defendant, Anna Adams, extending the time of payments on the promissory note executed by defendants William H. and Jessie Watson, for five years, secured by trust deed on the property in question. On the back of this agreement were endorsed a number of payments made by Mrs. Adams, each of which is acknowledged by John Grimm. Another extension agreement is in the record, entered into between the same parties on September 22, 1935, extending the time of payment of the $2,500 indebtedness against the property as evidenced by the note of the Watsons.

Defendant Anna Adams, called by plaintiff under Section 60 of the Civil Practice Act, testified that she resided in Port Huron, Michigan, and lived there all her life except for five years from 1913 to 1918, when she lived in Chicago; that she was employed by the Women's Benefit Association of Port Huron for 23 years prior to October, 1942, when she quit working; that in the transaction between herself, her brother and his wife, they were represented by Attorney Fisher (now Judge Fisher). She testified that she paid the $2,500 mortgage which was a lien on the property when it was conveyed to her.

There is further evidence to the effect that when the bank closed, the receiver who was operating the bank said that everyone would be paid 100 cents on the dollar and William Watson testified that at the time of the transaction he did not know that there was any liability on the part of any stockholder in anybbank.

The chancellor in deciding the case said that he observed the demeanor of the witnesses, discussed the testimony given by Judge Fisher, who did business and lived in the neighborhood

3.

property in 1921 she was her origin 1900 and between 1900 or 1900, and the plaintiff claims that there was a mortgage on the property at the time, of 1900. [illegible] the plaintiff held out in instalments. There is in the fact of no mortgage-in existence [illegible] dated September 1, 1921, executed by John Smith and Mehetabel, his wife, relinquishing the [illegible] of the mortgagors with the executed by mehetabel. [illegible] and [illegible] Mehetabel, the wife, assumed to have been on the property in question. On the back of this instrument were indicated a number of payments made by [illegible], each of which is acknowledged by John Smith. Another mortgagor [illegible] is the second, entered into between the [illegible] on the [illegible], 1921, extending the time of payment of the [illegible] instrument covering the property in question in the hands of the mortgagee.

Eighteen days later, which is obviously some months 90 of the first mortgage [illegible], testifies that the mortgage in dispute, Elizabeth, the first wife, died in the year 1900 and that the [illegible] Smith; that the mortgage employed by the mother's memory memorandum of [illegible] 20 years prior to [illegible], 1900, when the [illegible]; that the transaction between [illegible] and the wife, that were represented by attorney Elmer [illegible]. [illegible] testified that she said in 1900 [illegible] a time on the property when it was [illegible].

There is further evidence [illegible] that [illegible] the bank closed, for [illegible] the [illegible] [illegible] everyone could be paid 100 cents on the dollar. [illegible] testified that at the time of the transaction [illegible] that there was any liability on the part of the [illegible] to anybody.

The [illegible] in [illegible] the [illegible] the testimony of the witness, disregarded the testimony given by Judge Blake, who is deceased and lived in the neighborhood

where the building was located, and gave his opinion as to the value of the property in 1931; that Mr. Mulholland, who testified as a real estate expert on behalf of plaintiff had "not been in the building at all; he couldn't get in, apparently, but he gave his opinion as to what it was, that is, 15 years ago, based on an outside view." That under the law, where charge is made of fraud, the evidence must be clear and convincing; that plaintiff started the instant case about 15 years after the transfer of the property, and that he and the receiver, his assignor, were chargeable with laches. Continuing, the court said that plaintiff had not shown fraud, "But the testimony of the defendant is clear and honest, as far as I can see;" and that Judge Fisher's testimony was very conservative.

We think the decree entered by the Superior court of Cook county is in accordance with the evidence and it is therefore affirmed.

DECREE AFFIRMED.

Feinberg, J., concurs.

Niemeyer, J., dissenting.

This transaction is marked by convincing indicia of fraud. The conveyance rendered the grantors insolvent, leaving them with no other property than "a few sticks of furniture." The alleged consideration for an equity of not less than $2,500 was $1,250 - $800 mostly in cash loaned over a period of five months, following accrual of the liability of the grantors, and $450 paid in cash when the deed was executed. The transaction was between brother and sister. The close relationship excites suspicion but does not create a presumption of fraud. However, the proof should be clear and satisfactory that the alleged indebtedness was a valid and subsisting debt. Bartel v. Zimmerman, 293 Ill. 154; Frank v. King, 121 Ill. 250. Where one

where the building was located, and gave his opinion as to the value of the property in 1921; that Mr. Mullikin, who testified as a real estate expert on behalf of plaintiff had "not been in the building at all; he couldn't get in, apparently, but he gave his opinion as to what it was, that is, 11 years ago, based on a certain plan." That under the law, where average is made of 1-ear, the evidence must be clear and convincing; that plaintiff started the instant case about 11 years after the transfer of the property, and that he had received, his assignor, many compensations and benefits. Continuing, the court said that plaintiff had not shown fraud, "that the testimony of the defendant is clear and convincing, as far as I can see;" and that Judge Pickett's statement was very conservative.

We think the course pursued by the chancellor sworn of our county is in accordance with the evidence and is in therefore affirmed.

Affirmed.

Fa'ckney, J., concurs.

Stagner, J., dissenting.

This transaction is marked by convincing indicia of fraud. The courts, as well-said the chancery chancellor, deals with no other mystery; that "a few shades of feelings." The alleged consideration for a quarter of one line than $2,500 was $1,500 - 500 equally in each issued over a period of five months, following account of the liability of the grantors, and $470 paid in cash upon the date of execution. The transaction was between brother and sister. The circumstantially exclude compulsion but does not create a presumption of fraud. Moreover, the proof should be clear and satisfactory that the alleged indebtedness was a valid and subsisting debt. Terral v. Ziegenhagen, 223 Ill. 124; Frank v. Lane, 183 Ill. 450. Where one

is found insolvent after having made a voluntary conveyance to his wife, the burden of dispelling the implication of fraud as against preexisting creditors is upon his grantee. Birney v. Solomon, 348 Ill. 410; Second Nat'l Bank of Robinson v. Jones, 309 Ill. App. 358. There was nothing to evidence the alleged loans, and no time for their repayment was fixed. Only the parties in interest testified in support of them and as to the amount paid when the transfer was made. There was no change in the possession or control of the premises. The debtors continued in possession to the time of the trial (about 15 years) without payment of rent, and collected the rent from the apartment on the second floor, applying it to the payment of taxes, upkeep of the premises and their living expenses. Watson was temporarily out of employment at the time of the conveyance, but the record is silent as to any necessity of accepting the charity of his sister throughout the years. His wife was employed until 1935 and, so far as the record shows, her unemployment after that time was voluntary. The sister of the grantee was employed until 1942 and is now living "from social security and from money I have." It does not appear that she was so comfortably situated financially that she could afford to purchase property and permit her brother to enjoy the possession and income of it throughout the years. The circumstances in evidence are convincing that it was the intention of the parties that the possession and control of the premises and its income should remain unchanged. This vitiated the transaction. Moore v. Wood, 100 Ill. 451; Hornberger v. Blackwell, 241 Ill. App. 398.

Other testimony shows that the transaction was not what it purported to be. When asked if she had had any conversation with her brother before the execution of the deed about the purchase of the premises, the grantee answered, "Well, just casually. I bought the property, that is all." When asked the reason for

is found insolvent after having made a voluntary conveyance to his wife, the burden of disproving the institution of fraud as against preexisting creditors is upon his creditors. Hymer v. Johnson, 346 Ill. 410; Second Nat'l Bank of Robinson v. Lewis, 209 Ill. App. 359. There was opinion to evidence the alleged loans, and no time for their repayment was fixed. Only the parties in interest testified in support of them and as to the amount paid when the transfer was made. There was no change in the possession or control of the premises. The defendants continued in possession to the time of the trial (about 14 years) without payment of rent, and occupied the rent from the apartment on the second floor, applying it to the payment of taxes, upkeep of the premises and their living expenses. Women are temporarily out of employment at the time of the conveyance, but the record is silent as to the desirability of ascertaining the ability of his sister thoroughout the years. His wife was employed until 1928 and, so far as the record shows, her unemployment after that time was voluntary. The sister of the grantee was employed until 1928 and is now living "from social security and from money I have." It does not appear that she was so comfortably situated financially that she could afford to purchase property and permit her brother to enjoy the possession and income of it throughout the years. The circumstances in evidence are convincing that it was the intention of the parties that the possessions and control of the premises and the income should remain unchanged. This vitiated the transaction. Lewis v. Lewis, 1?? Ill. 421; Hornbrenner v. Hornbrenner, 41 Ill. App. 478.

Other testimony shows that the transaction was not what it purported to be. When asked if she had had any conversation with her brother before the execution of the deed about the purchase of the premises, the grantee answered, "Well, just casually. I bought the property, that is all." When asked the reason for

the conveyance, Watson said, "In order to protect her in case anything happened to us, why, I said, 'All right, take the property.'" In answer to a question as to how he came to transfer the property, he replied, "As security, I had to do it. I had to protect her." Mrs. Watson testified that she would not have conveyed the property to anyone else and that she thought the money given them when the papers were signed was given for title to the property and for living expenses. Retention of possession and the income from the premises is consistent with the giving of the deed as security, as Watson testified, and inconsistent with an outright sale of the property. This secret trust destroys the transfer. Zwick v. Catavenis, 331 Ill. 240; McKey v. Cochran, 262 Ill. 376.

The grantee's conduct relating to the extension and payment of the mortgage is not the normal conduct of a person acquiring absolute title from her grantors. The first agreement extending the mortgage, executed after the giving of the deed, was prepared by the lawyer who had prepared the deed now in controversy. It was signed by the Watsons as well as the grantee. The grantee claims to have paid the mortgage of $2,500 in partial payments, made at various times and always in cash. She had a bank account as late as September, 1932, if not later. She claims to have come to Chicago from Port Huron, Michigan each time a payment was made, bringing the money with her. She testified that her brother was with her when she made payments of $500 in September, 1933, and $225 in March, 1934, the only payments made before the judgment, the basis of this action, was obtained against the grantors. She was not asked as to Watson's presence when subsequent payments were made. The mortgagee's endorsements on the extension agreements merely acknowledged receipt of such payments but afford no evidence as to the source of the money with which the payments were made. Evidence on this point depends entirely upon the defendants.

the conveyance, Watson said, 'In order to protect her in case anything happened to us, she, I said, 'All right, take the property.'' In answer to a question as to how he came to transfer the property, he replied, 'The security, I had to do it. I had to protect her.' Mrs. Watson testified that she would not have conveyed the property to anyone else and that she thought the money given him when the property was signed was given for title to the property and for living expenses. Retention of possession and the income from the property is consistent with the giving of the deed as security, as Watson testified, and inconsistent with an outright sale of the property. This record that authorizes the transfer. Lewis v. Kotzenski, 121 Ill. 240; Lahey v. Kinney, 122 Ill. 123.

The grantee's counsel relying on the payment of the mortgage is not the proper method of a person acquiring absolute title from her grantors. The final agreement extending the mortgage, executed after the signing of the deed, was prepared by the lawyer who had prepared the deed and is controverted. It was signed by the Watsons as well as the grantee. The grantee claims to have paid the mortgage of $2,500 in partial payments, made at various times and always in cash. She had a bank account in Iowa as witnesses, 1900, if not later. She claims to have come to Chicago from Fort Worth, Michigan each time a payment was made, bringing the money with her. She testified that her brother was with her when she made payments of $500 in September, 1900, and also in March, 1904, the only payments made before the judgment, the basis of this action, was obtained against the grantors. She was not asked as to Watson's presence when subsequent payments were made. The mortgagee's endorsements on the extension agreement merely acknowledged receipt of such payments but afford no evidence as to the source of the money with which the payments were made. Evidence on this point depend entirely upon the determination.

The majority opinion comments unfavorably on the testimony of the witness who appraised the property for plaintiff. The testimony of the witness for defendants is equally assailable. Although he had visited the property some years before, apparently not for appraisal purposes, he was unable to tell the number of rooms in the two flats of the building. He was a reluctant witness as to value. He testified: "I wouldn't be in a position to state what the value of the property was other than the fact that just about that time real estate seemed to have very little value," and: "Well, I do not know the value of that particular building at that time." However, he rewarded the persistence of counsel by finally stating as to value: "I would say not in excess of $5,000." He agreed with plaintiff's witness that, notwithstanding the building is 15 years older, the property is now worth more than in 1931. He placed the present value at $9,500.

As to the defense of laches, it must be borne in mind that "It is only when the delay is accompanied by some other element rendering it inequitable to permit the owner to assert his title that laches will bar a right within the statutory period." Schultz v. O'Hearn, 319 Ill. 244. The judgment which is the basis of this suit was not entered until June, 1934, and no right of action accrued until that time. On March 24, 1936, less than two years later, the mortgage had been reduced to $500. The record is silent as to when the balance was paid, but, as no extension of the mortgage beyond September 22, 1938 is shown, it may be presumed that the last payment was not later than that date. It can hardly be contended that the defense of laches would have been available at that time. Nothing occurred subsequently to change the situation of the parties and render enforcement of the claim a hardship on the grantee or the grantors. To the contrary, it appears, taking the present value of the

The majority opinion concerns itself only with the testimony of the witness who evaluates the property for plaintiff. The testimony of the witness for defendants is equally meritorious. Although on but related for property some years before, expressly not for municipal purposes, he was unable to tell the number of rooms in the two flats of the building. He was a reluctant witness as to value. On cross-examination: "I wouldn't be in a position to state what the value of the property was other than the fact that just about that time real estate seemed to have very little value," and: "well, I do not know the value of that particular building at that time." Nevertheless, he remarked the peculiarness of assessed by Kimball stating as to value: "I would say not in excess of $6,000." We agree with plaintiff's witness that, notwithstanding the building is 10 years older, the property is now worth more than in 1921. We placed the present value at $8,000.

As to the defense of laches, it must be borne in mind that "it is only when the delay is accompanied by some other element materially if immaterially in permit the owner to assert his rights that laches will bar a right within the prescribed period." Kenyon v. Gibson, 14 Ill. 304. The judgment was in the basis of this suit was not entered until June, 1924, and no right of action accrued until that time. On March 24, 1922, less than two years before, the mortgage had been reduced to $800. The record is silent as to when the balance was paid, but, as an estimation of the mortgage bond September 8, 1922 is shown, it may be presumed that the last payment was not later than that date. It can hardly be contended that the defense of laches would have been available at that time. Nothing occurred subsequently to change the situation of the parties and neither enforcement of the claim a mechanic on the premises nor the property. To the contrary, it appears, taking the present value of the

property at $9,500, as fixed by defendants' witness, that it constitutes a fund sufficiently large to pay the judgment, with interest, and to reimburse the grantee for her alleged advances.

43848

MARTHA GEORGE, et al., Appellants, v. DR. LEWIS D. MOORHEAD, et al., Appellees.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiffs appeal from an order of the Superior Court, dismissing their complaint seeking to set aside the will of H. C. Berthold Wetstone, deceased, on the grounds of mental incapacity and undue influence. Answers were filed to the complaint. Defendants filed their written motion to dismiss on the ground that plaintiffs were on October 22, 1945 by a decree of the Circuit Court of Cook County found not to be the heirs or next of kin of said deceased therefore not parties in interest under the statute entitling them to maintain the complaint to contest the will. The decree of the Circuit Court was entered on appeal from the Probate Court of Cook County finding plaintiffs to be the heirs of said deceased. The same parties on this appeal were involved in that hearing.

An appeal was taken from the decree of the Circuit Court and was docketed in this court as No. 43700 at the April Term, 1946. Pending the appeal in this court, the motion above referred to was made in the Superior Court. Plaintiffs countered with a motion that the Superior Court withhold action upon the motion until the disposition by this court of the appeal from the Circuit Court.

No supersedeas was applied for or issued by this court on the appeal from the Circuit Court. The chancellor in the Superior court, by order entered February 15, 1946, directed

that plaintiffs apply to this Court in the case on appeal from the Circuit Court for leave to file a supersedeas bond, within 10 days from said date, in the sum of $5,000, and that in the event this court did not grant said leave the Superior Court suit stand dismissed at plaintiffs' cost and defendants have judgment therefor. Plaintiffs not having applied to this court for a supersedeas, the Superior Court on February 28, 1946, entered an order dismissing the suit and entering judgment against the plaintiffs for costs.

Following the latter order of the Superior Court, this court on November 18, 1946 filed an opinion in cause No. 43700, reversing and remanding the decree of the Circuit Court and directing the Circuit Court to enter an order finding the plaintiffs to be the heirs of Wetstone, deceased.

In view of what we said in the opinion in No. 43700, it follows that plaintiffs are parties in interest under the statute and entitled to bring the action in the Superior Court of Cook County to contest the will.

The decree of the Superior Court is reversed and the cause remanded for hearing.

REVERSED AND REMANDED.

O'Connor, P. J., and Niemeyer, J., concur.

that plaintiffs appeal to this Court is the sale on appeal from the Circuit Court, for leave to file a supersedeas bond, which is duly from said judgment, in the sum of $[illegible], and that in the event this court did not grant said leave the Superior Court would stand dismissed at plaintiffs' cost and exceptions from judgment accordingly. Plaintiffs not having applied to this court for a supersedeas, the Superior Court on remand ab, inio, entered an order dismissing the suit and overruling judgment against the plaintiffs for costs.

Following the latter order of the Superior Court, this court on Brewster vs. Ind. Tribe on motion is bound to, affirm, reversing and remanding the decree of the circuit court and directing the Circuit Court to enter an order finding the plaintiff's in the nature of receivers, however.

In view of such as said in the opinion in Mo. ARTCO, it follows that plaintiffs are entitled to interest under the statute and entitled to bring the action in the capacity of good faith to protect themselves.

The decree of the Superior Court is reversed and the cause remanded for hearing.

Attorneys for Appellant.

O'Donnell, J. L., and Wampler, J., counsel.

43860

DR. WILLIAM H. BENSON, Appellee,	
v.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
EARL M. WILLIAMS and WESTERN CASUALTY & SURETY COMPANY, a corporation, Appellants.	

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff brought this action in the Circuit Court against defendants Williams and Western Casualty & Surety Company. Judgment was entered for the plaintiff, from which defendants appeal. Plaintiff has filed a cross-appeal, claiming the judgment should have been for a greater amount. The trial was before the court, without a jury,

It appears that plaintiff rented the third floor apartment at 5945 Prairie Avenue to one Harold Hoppley. Hoppley rented a room to defendant Williams and his wife. Without notifying plaintiff, Hoppley moved out of the apartment. Defendant Williams thereafter occupied the entire apartment and rented out some of the rooms to sub-tenants, all without the knowledge and consent of plaintiff. The rent paid by Hoppley for the apartment was $57.50 a month. Upon the plaintiff discovering the possession of the entire apartment by defendant Williams, and the sub-leasing to sub-tenants, he demanded possession. Defendant Williams refused tobsurrender, and plaintiff brought an action in forcible detainer in the Municipal Court of Chicago against defendant Williams, in which action judgment for possession was entered for plaintiff and a writ of restitution issued. An appeal was taken from that judgment to this court, and the judgment of the Municipal Court was affirmed. The case is reported in abstract form, Benson v. Williams,

324 Ill. App. 580. An appeal bond in the amount of $800 with the Western Casualty & Surety Company, as surety, was given by Williams on that appeal.

The instant action is upon the appeal bond against the Western Casualty & Surety Company for the reasonable rental value of the premises during the occupancy by Williams, and against Williams for double rent, under section 2, chapter 80, Illinois Revised Statutes, 1945, for wilfully withholding possession. The trial court found the reasonable rental value of the premises during the period in question to be $57.50 per month. Plaintiff, cross-appellant, suggests that the finding should have been in the amount of $134.33 per month for the period in question, and double that amount as damages against Williams under the statute.

It is admitted by plaintiff that the surety is not liable for the double rent penalty under the statute, applicable to defendant Williams. The burden of proving the reasonable rental value was upon plaintiff. The amount of rent charged to Hoppley, the original tenant, was $57.50 per month. There could be no increase in the rental charge for that apartment during the period in question without the authority of the Office of Price Administration, acting under the Federal Emergency Price Control Act and the regulations issued thereunder. It is stated in plaintiff's brief that the trial court gave no consideration to the authorization by the Office of Price Administration for the monthly rental charge of $134.33 made by Williams to his sub-tenants. A search of this record fails to disclose any evidence of such authority. We cannot presume it was given in the amount claimed by plaintiff. It was incumbent upon plaintiff to produce the proof of such authority. It is true that the wife of defendant Williams testified that she registered

(See III, Ann. 20). An annual bond in the amount of $200 with the Western Casualty & Surety Company, as surety, was given by Williams on that account.

The instant action is upon the annual performance bond Western Casualty & Surety Company for the recoverable penal value of the premiums during the occupancy by Williams, and against Williams for double rent, under section [illegible], chapter 40, Illinois Revised Statutes, 1945, for willfully retaining possession. The trial court found the reasonable rental value of the premises during the period in question to be $[illegible] per month. Plaintiff, proceeding-defendant, contends that the trial court should have been in the amount of $[illegible] per month for the period in question, and cite the [illegible] of Williams under the statute.

It is admitted by plaintiff that [illegible] for the double rent penalty under the statute, [illegible] defendant Williams. The burden of proving the fair reasonable rental value was upon plaintiff. The amount of rent paid to Crosby, the original tenant, was $[illegible] per month. There could be no increase in the rental charge for that apartment during the period in question without the authorization of the Office of Price Administration, acting under the Federal Emergency Price Control Act and the regulations issued thereunder. It is stated in plaintiff's brief that the trial court gave no consideration to the authorization by the Office of Price Administration for the monthly rental charge of $[illegible] made by Williams to his sub-tenants. A copy of this record fails to disclose any evidence of such authority. In cases where it has been in the general judgment by plaintiff. If one invokes such plaintiff to produce the proof of such authority. It is true that the rule of [illegible] Williams [illegible] not [illegible]

the apartment with the Office of Price Administration, but this falls far short of proof as to the actual authority issued by the Office of Price Administration for the rental charge made by Williams. The court entered judgment against the surety company for $677.92 and against Williams for $1272.08, the latter being double the reasonable rental value. Half of this judgment against Williams is included in the judgment against the surety company, plus the court costs upon the appeal from the Municipal Court judgment.

The only remaining question urged by defendants is that there is no proof of a wilful withholding by Williams, which would justify the imposition of the penalty for double rent under the statute. The opinion of this court in Benson v. Williams, 324 Ill. App. 580, fully sets up the facts developed upon the trial of the forcible detainer action and discloses clearly that Williams was guilty of wilfully withholding possession of the premises. The tricks and artifices he employed to conceal from plaintiff the fact that Hoppley had moved out of the apartment, and that he (Williams) was occupying the same and renting some of the rooms in the apartment to sub-tenants, are sufficient to establish the wilful withholding under the statute. The trial court in its judgment found that Williams was guilty of wilfully withholding, and we cannot say that the judgment of the court is against the manifest weight of the evidence. Ledbetter v. Evans, 290 Ill. App. 533.

We think the judgment of the Circuit Court was correct, and it is affirmed.

AFFIRMED.

O'Connor, P. J., and Niemeyer, J., concur.

the management with the duties of price administration, but this failing for want of proof as to the actual damages caused by the duties of price administration for the period charge made by Williams. The court adopted judment against the surety company for [illegible] and dismissed Williams for [illegible], the latter being within the jurisdictional pecuniary value. Suit of this judgment against Williams is included in the judgment against the surety company, plus the costs taken upon the appeal from the municipal court judgment.

The only remaining question which is jurisdictional is that there is no point of a motion originating by Williams, which would justify the consideration of the majority for minute that under the statute. The statute of this court in Wagner v. Williams, one 111. app. 400, fully sets up to the total amount the total of the certain services which and disposes directly that Williams was entitled to utility allocating commerce of the business. The facts are sufficient as modified to consent from plaintiff the part that [illegible] and [illegible] the [illegible], and that [illegible] (Williams) was compelled to [illegible] and [illegible] the [illegible] in the [illegible] are sufficient to establish the [illegible] state. The total [illegible] to the judgment [illegible] was [illegible] of which [illegible], and [illegible] judgment of the court is [illegible] the [illegible] of the evidence. Lodgetter v. Dunn, 100 Ill. app. 524.

We think the judgment of the [illegible] court was correct, and it is affirmed.

AFFIRMED.

O'Connor, P. J., and Sheppard, J., concur.

43636

330 I.A. 242

LUTHER WILLIAMS, doing business as L. WILLIAMS & SON, Appellee,	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	)	
HOWARD AMES, Appellant.	)	

74

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This action was brought by plaintiff, Luther Williams, doing business as L. Williams & Son, to recover from the defendant, Howard Ames, the contract price for certain sewer work. The case was tried by the court without a jury, the issues were found in favor of plaintiff and his damages were assessed at $160. Judgment was entered against defendant on said finding and he appeals.

Defendant's principal contention is that the finding and judgment of the trial court were against the manifest weight of the evidence.

Plaintiff was a licensed sewer contractor and defendant was the owner of the premises at 2444 South Michigan avenue, Chicago, Illinois. This property was improved with an apartment building which extended from the west lot line of Michigan avenue to the alley to the west thereof. The parties entered into the following contract which was written by defendant in longhand:

"Chicago, Ill., Feb. 13, 1945.
To Howard Ames
2444 Michigan Avenue

L. Williams & Son, 421 E. 63rd Str., agree to rebuild catch basin and reroute sewer so that all water from roofs and sinks will go through the rebuilt catch basin with cement blocks and new trap and from the new trap with an access opening for rodding sewer to 25th Str. so that all fixtures, downspouts and sewer pipes will be properly placed according to law and so that area at back door to back yard will be properly drained. Said contractor agrees to furnish

LUTHER WILLIAMS, doing business as L. WILLIAMS & SON, Appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
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all material and labor and receipts for same or waivers of lien and will pay for permits and inspection and do a complete and workmanlike job to satisfaction of City of Chicago and inspectors for the contract price of One Hundred and Sixty Dollars ($160.00).

L. Williams & Son (Seal)
L. Williams (Seal)

Accepted
Howard Ames, Owner."

The building at 2444 South Michigan avenue was erected more than 50 years ago. The front portion thereof was built first and the rear portion added later. The catch basin referred to in the contract was in an areaway back of the front portion of the building. It appeared that the old catch basin was "all caved in," that "the sewer was blocked" and that some toilets in the rear of the front part of the building emptied into the old catch basin contrary to law. According to plaintiff he started to perform the work specified in the contract on February 15, 1945 but, before doing so, he notified the sewer department of the City of Chicago and Bernard Swieczkowski, a city sewer inspector, came to the job that morning.

It will be noted that the contract provided that plaintiff was to replace the old catch basin with a new one, that he was to reroute the sewer from the catch basin to the sewer in the alley which connected with the 25th street sewer and that he was to properly connect with the rerouted sewer the toilets which had theretofore emptied into the old catch basin.

Plaintiff and his employees were removing the old catch basin when the city inspector arrived on the morning of February 15, 1945 and Williams was told by said inspector that the sewer in the alley and the 25th street sewer were at too high a leval to carry off the sewage from the toilets and that it would be necessary for him to connect the sewer, which he had agreed

all material and labor and furnishes for same or suppliers of like and will pay for permits and inspection and do a complete and workmanlike job to satisfaction of city of Chicago and inspectors for the contract price of Two Hundred and sixty Dollars ($260.00).

L. Williams & Son (Seal)
L. Williams (Seal)

Accepted
Howard Leeb, Owner."

The building at 2444 North Michigan Avenue was erected more than 30 years ago. The front portion thereof was built first and the rear portion added later. The catch basin referred to in the contract was in an areaway back of the front portion of the building. It appeared that the old catch basin was "all caved in," that "the sewer was blocked" and that some toilets in the rear of the front part of the building emptied into the old catch basin contrary to law. According to plaintiff he started to perform the work specified in the contract on February 13, 1947 but, before doing so, he notified the sewer department of the City of Chicago and Permit Dwickowski, a city sewer inspector, came to the job that morning.

It will be noted that the contract provided that plaintiff was to replace the old catch basin with a new one, that he was to reroute the sewer from the catch basin to the sewer in the alley which connected with the 25th street sewer and that he was to properly connect with the rerouted sewer the toilets which had theretofore emptied into the old catch basin.

Plaintiff and his employees were removing the old catch basin when the city inspector arrived on the morning of February 13, 1947 and Williams was told by said inspector that the sewer in the alley and the 25th street sewer were at too high a level to carry off the sewage from the toilets and that it would be necessary for him to connect the sewer, which he had agreed

with defendant to reroute, so that it would empty into the sewer in front of the premises on Michigan avenue. There was a main sewer that descended from west to east under the entire length of the building and this sewer emptied into the Michigan avenue sewer.

Plaintiff apprised defendant as to the directions given him by the city inspector and, according to Ames, he met Williams at the building on February 17, 1945. Ames testified that at that time "he [Williams] said he could not do what was intended to be done. He said that he could not connect the toilet that had been put in the catch basin with the sewer in the alley going to 25th street. That was for the reason that the sewer was higher than the toilet. He wanted to know if there was any other way to do it. I said there was another way to do it, by connecting with the main sewer, under * * * the building at 2444 South Michigan avenue, because it descended from West to East."

This testimony of Ames indicates that he acquiesced in plaintiff's deviation from the terms of the written contract to the extent of connecting the new catch basin and the toilets with the main sewer under the building that emptied in the Michigan avenue sewer.

Plaintiff testified positively that he rebuilt the catch basin out of new materials, that he put a trap in same, that he built a new sewer which connected the catch basin with the main sewer under the building, that he also connected the toilets, which had previously emptied into the old catch basin, with the main sewer and that he complied in all other respects with the terms of the written contract as modified.

Williams further testified that he started the job on February 15, 1945 and completed it on February 19, 1945, that

with defendant to repair, so that it would empty into the sewer in front of the premises on Michigan avenue. There was a main sewer that descended from west to east under the entire length of the building and this sewer emptied into the Michigan avenue sewer.

Plaintiff supplied defendant as to the directions given him by the city inspector and, according to Ames, he met Williams at the building on February 17, 1947. Ames testified that at that time "he [Williams] said he could not do what was intended to be done. He said that he could not connect the toilet that had been put in the catch basin with the sewer in the alley going to 75th street. That was for the reason that the sewer was higher than the toilet. He wanted to know if there was any other way to do it. I said there was another way to do it, by connecting with the main sewer, under [illegible] the building at 2444 South Michigan avenue, because it descended from West to East."

This testimony of Ames indicates that he supplanted in plaintiff's deviation from the terms of the written contract to the extent of connecting the new catch basin and the toilets with the main sewer under the building that emptied in the Michigan avenue sewer.

Plaintiff testified positively that he rebuilt the catch basin out of new materials, that he put a trap in same, that he built a new sewer which connected the catch basin with the main sewer under the building, that he also connected the toilets, which had previously emptied into the old catch basin, with the main sewer and that he complied in all other respects with the terms of the written contract as modified.

Williams further testified that he started the job on February 15, 1947 and completed it on February 19, 1947, that

he and the sewer inspector tested the job with bluing after it was completed and found that the sewage flowed from the toilets through the sewer he had installed and the main sewer under the building into the Michigan avenue sewer; that he supervised three men in the performance of the work on this job, each of whom was paid $25.30 for his labor; that he paid $33 for the material used on the job; and that he paid $7.50 to the city for a permit. Receipts for the aforesaid payments were offered and received in evidence. Both plaintiff and the city inspector, who had visited the job every day until it was completed, testified that the catch basin and the sewer in question were installed in a workmanlike manner and in conformity with the pertinent ordinances of the City of Chicago. According to plaintiff, when he requested payment of the contract price after he had completed the work, Ames refused to pay him same but offered to settle with him for $75, which amount he refused.

Defendant did not see the work done. He did not claim at the trial that he had any personal knowledge that plaintiff did not properly connect the toilets and the sewer which he installed with the main sewer under the building that emptied into the Michigan avenue sewer and no witness testified in his behalf that the sewer plaintiff installed and the toilets were not properly connected with the aforesaid main sewer.

Defendant alleged and sought to prove as his principal defense to plaintiff's claim that the latter "informed" him that, instead of connecting the toilets in the rear basement of the front portion of the building with the main sewer under said building that descended from west to east into the Michigan avenue sewer, he connected them with a certain drain "A".

In June the sewer inspector tested the job with plugging after it was completed and found that the sewage flowed from the toilets through the sewer he had installed and the main sewer under the building into the Michigan avenue sewer; that he supervised three men in the performance of the work on this job, each of whom was paid $25.00 for his labor; that he paid $22 for the material used on the job; and that he paid $7.50 to the city for a permit. Receipts for the aforesaid payments were offered and received in evidence. Both plaintiff and the city inspector, who had visited the job every day until it was completed, testified that the outlet basin and the sewer in question were installed in a workmanlike manner and in conformity with the permit ordinances of the City of Chicago. According to plaintiff, when he requested payment of the contract price after he had completed the work, Amos refused to pay him some but offered to settle with him for $75, which amount he refused.

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Defendant alleged and sought to prove as his principal defense to plaintiff's claim that the latter "informed" him that, instead of connecting the toilets in the rear basement of the front portion of the building with the main sewer under said building that descended from east to west into the Michigan avenue sewer, he connected them with a certain drain "A".

Ames testified that this drain "A" descended from east to west and was not intended to and could not empty the waste matter from the toilets into the main sewer even though it was connected therewith, because such waste matter could not travel uphill through drain "A" from the toilets to the main sewer. He further testified at great length as to the conversation heretofore referred to between him and plaintiff on February 17, 1945 and to various other conversations between them on March 28, 1945 and thereafter. This testimony was to the effect that plaintiff told him in the conversation of February 17, 1945 that he was going to connect the toilets with drain "A" instead of with the main sewer under the building and that plaintiff told him in the later conversations that he had connected the toilets with drain "A". The defendant also testified that plaintiff tore up a floor which he failed to replace; that he failed to remove certain rubbish and broken concrete from the premises and that it would cost him $30 to replace the floor and have the concrete and rubbish hauled away.

We could not even attempt within the scope of this opinion to recite in detail defendant's testimony as to his conversations with plaintiff and it would serve no useful purpose to do so. Plaintiff specifically denied that he made any of the admissions attributed to him by defendant and he furthed denied that Ames suffered any damage as a result of his performance of the contract as modified.

As heretofore shown, defendant did not produce a particle of evidence upon the trial that tended to show that plaintiff did not comply with the requirements of the contract that he perform the work "according to law" and "do a complete and workmanlike job to satisfaction of City of Chicago and

Jones testified that this drain "A" increased from east to west and was not intended to and could not empty the waste matter from the toilets into the main sewer even though it was connected therewith, because such waste matter could not travel uphill through drain "A" from the toilets to the main sewer. He further testified at great length as to the conversation hereinbefore referred to between him and plaintiff on February 17, 1947 and to various other conversations between them on March 24, 1947 and thereafter. Jones testimony was to the effect that plaintiff told him in the conversation of February 17, 1947 that he was going to connect the toilets with drain "A" instead of with the main sewer under the building and that plaintiff said nothing in the later conversations that he had connected the toilets with drain "A". The defendant also testified that plaintiff torn up a floor which he failed to replace; that he failed to remove certain rubbish and broken concrete from the premises and that it would cost him $30 to replace the floor and have the concrete and rubbish hauled away.

We could not even attempt within the scope of this opinion to recite in detail defendant's testimony as to his conversations with plaintiff and it would serve no useful purpose to do so. Plaintiff specifically denied that he made any of the admissions attributed to him by defendant and he further denied that Jones suffered any damage as a result of his performance of the contract as modified.

As heretofore shown, defendant did not produce a particle of evidence upon the trial that tended to show that plaintiff did not comply with the requirements of the contract that he perform the work "according to law" and "do a complete and workmanlike job to satisfaction of City of Chicago and

inspectors." This case was tried nearly seven months after the work was completed and there was bound to be an odor from the toilets if they were connected, as defendant claims, with drain "A". Yet he presented no evidence that there was any odor from the toilets at any time during said period.

Defendant indulges in the specious argument that plaintiff failed to comply with the provision of the contract requiring him to furnish him (Ames) with receipts for the labor and materials used on the job. Certainly Williams was not required to deliver such receipts to Ames when the latter refused to pay for the work. It was sufficient that he had the receipts and presented them in evidence at the trial.

One of the requirements of the contract was that all fixtures, downspouts and sewer pipes were to be properly placed "so that area at back door to back yard will be properly drained." Defendant sought to show by the testimony of Martin Zerfuss that plaintiff failed to comply with this requirement. Zerfuss testified that he went to the building in June, 1945 with defendant; that at that time the area referred to in the contract was "full of water"; that the water was six or eight inches deep; and that he "got a stick and felt around in there and could not find an opening, although there might be one there that was stopped up." Defendant testified that the only time he saw water on this area after February 19, 1945 was when he was at the building with Zerfuss in June, 1945. This was about four months after plaintiff completed his work and it will be noted that Zerfuss did not testify that there was not a drain "properly placed" to carry off the water but that there might have been one there which was "stopped up." We refer to and recite this testimony merely as an illustration of the character of evidence presented by defendant in his endeavor to defeat plaintiff's claim.

inspectors." This work was total roughly seven months after the work was completed and there was found to be an odor from the toilets if they were connected, so defendant claims, with drain "A". Let he presented no evidence that there was any odor from the toilets at any time during said period.

Defendant indulges in the specious argument that plaintiff failed to comply with the provision of the contract requiring him to furnish him (sic) with receipts for the labor and materials used on the job. Certainly plaintiff was not required to deliver such receipts to him when the latter refused to pay for the work. It was sufficient that he had the receipts and presented them in evidence at the trial.

One of the requirements of the contract was that all fixtures, downspouts and sewer pipes were to be properly placed "so that area at back door to back yard will be properly drained." Defendant sought to show by the testimony of Martin Ferrara that plaintiff failed to comply with this requirement. Ferrara testified that he went to the building in June, 1949 with defendant; that at that time the area referred to in the contract was "full of water"; that the water was six or eight inches deep; and that he "got a stick and felt around in there and could not find an opening, although there might be one there that was stopped up." Defendant testified that the only time he saw water on this area after February 15, 1949 was when he was at the building with Ferrara in June, 1949. This was about four months after plaintiff completed his work and it will be noted that Ferrara did not testify that there was not a drain "properly placed" to carry off the water but that there might have been one there which was "stopped up." We refer to and recite this testimony merely as an illustration of the character of evidence presented by defendant in his endeavor to defeat plaintiff's claim.

As an evidence of his good faith plaintiff offered upon the trial to dig up the yard and the basement of the building to demonstrate that the new sewer he installed and the toilets were properly connected with the main sewer, if defendant paid the cost of such work. Defendant rejected this offer. While defendant's rejection of this offer cannot be held to militate against his defense, its acceptance would have furnished absolute proof at comparatively small cost as to whether or not plaintiff properly performed his work.

The evidence showed beyond question that there was substantial performance on plaintiff's part of the contract as modified. "It is the law in this state that * * * building contracts are to be construed liberally, and that a literal compliance with their terms is not necessary to entitle a recovery, but a substantial performance in good faith is sufficient." Theis v. Svoboda, 166 Ill. App. 20. To the same effect are Foster v. McKeown, 192 Ill. 339, and Edinger Co. v. Willis, 260 Ill. App. 106.

We are impelled to hold not only that the finding of the trial court upon which the judgment was entered was not against the manifest weight of the evidence but that said finding was abundantly supported by the evidence.

We have considered the other grounds urged for reversal and find them to be without merit.

For the reasons stated herein the judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Friend and Scanlan, JJ., concur.

As an evidence of his good faith plaintiff offered upon the trial to dig up the yard and the basement of the building to demonstrate that the new sewer he installed and the toilets were properly connected with the main sewer, if defendant paid the cost of such work. Defendant rejected this offer. While defendant's rejection of this offer cannot be held to militate against his defense, its acceptance would have furnished absolute proof at comparatively small cost as to whether or not plaintiff properly performed his work.

The evidence showed beyond question that there was substantial performance on plaintiff's part of the contract as modified. "It is the law in this state that * * * building contracts are to be construed liberally, and that a literal compliance with their terms is not necessary to entitle a recovery, but a substantial performance in good faith is sufficient." Theis v. Svoboda, 166 Ill. App. 20. To the same effect are Foster v. Swanson, 192 Ill. 339, and Ellinger Co. v. Willis, 260 Ill. App. 106.

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We have considered the other grounds urged for reversal and find them to be without merit.

For the reasons stated herein the judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Friend and Scanlan, JJ., concur.

43763

TURNER G. FREENY, Appellant,

v.

EFFIE FREENY, Appellee.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal by plaintiff, Turner C. Freeny, seeks to reverse a decree of the trial court which dismissed his complaint for divorce for want of equity. The case was tried by the chancellor without a jury.

Plaintiff's complaint, filed March 23, 1945, alleged inter alia that he married the defendant, Effie Freeny, on December 14, 1931; that no children were born of their marriage; that he and his wife separated on or about February 5, 1945; that they had not lived together as man and wife since that time; and that "defendant, between February 7th and March 9th, 1945, committed adultery with persons, some of whose names are unknown and some of whose names are known to plaintiff."

Defendant's answer, filed May 9, 1945, specifically denied the material allegations of the complaint.

During the course of the trial, pursuant to leave granted, plaintiff filed an amended complaint which was in substance the same as the original complaint except that it contained the additional allegation that "in and during the months of June, July, and August, 1936, in Chicago, Illinois, the said defendant committed adultery with a certain John Doe whose name is known to this plaintiff." Defendant's answer to the original complaint was allowed to stand as her answer to the amended complaint.

We will first consider the evidence pertaining to plaintiff's charge that defendant committed adultery on the night of March 7, 1945.

Plaintiff, Turner C. Freeny, testified that he had been absent from the city since January, 1945 and that he arrived in Chicago from Little Rock about 9 A.M. on March 3, 1945; that he went directly to his home; that "there wasn't anybody there *** so I left, took my bag and left as though I hadn't been there"; that he did not return to his home or see or talk to his wife until March 8, 1945; that he had private detectives "check his house" on the night of March 7, 1945; that about "twelve-fifteen or twenty in the morning" of March 8, 1945 he went to his home at 4716 South Parkway accompanied by private detectives; that he "unlocked the lower door and went upstairs"; that he unlocked the front door of his apartment with his key but could not get in because the night latch was on; that he "seemingly could hear someone moving around inside" and his wife asked, "Who is it?"; that he answered, "It is Turner, it is me"; that "after I waited about five or six minutes, maybe seven minutes, she opened the door *** I walked in *** put my bag down, dropped my coat, and went direct to the kitchen *** looked at the bed *** looked at the night stand *** there were a couple of glasses on that *** I looked *** in the kitchen *** the door wasn't fastened"; that he then "picked up his bag" and told his wife "that was all"; and that he walked out and did not live with her after that.

Milton Thompson, an operator for Hargraves Detective Agency, had plaintiff's wife under investigation and observation since February 7, 1945. During that period, according to Thompson, he had seen defendant and a man sitting at a booth in the Palm Tavern and had seen her and the same man at the El Grotto Cafe, but not together. Thompson engaged Grant E. Jackson, who had an automobile, to assist him in keeping the Freeny home under surveillance on the night of March 7, 1945. Jackson was paid $25 for his services and for the use of his

car. They both testified that they were in Jackson's car which was parked in front of 4716 South Parkway from about 9 P.M. until 11 P.M. on said night. Thompson further testified that about 11 P.M., while he and Jackson were sitting in the car, he saw a man, who resembled the man he had theretofore seen with Mrs. Freeny, approach and enter the courtway that led to the Freeny apartment entrance; that he (Thompson) got out of the car, followed the man, saw him push the Freeney bell and go upstairs; that he then telephoned to Freeny's attorney; that he met plaintiff and his attorney in front of the building upon their arrival at about 11:20 P.M. or 11:30 P.M.; that he then went to the rear of the building and stationed Jackson in front of same; that about midnight he saw a light in the kitchen of the 3rd floor apartment where the Freenys lived; and that he then started up the rear stairway and met the same man coming down the stairs that he had seen entering the building about 11 P.M.

In the course of Thompson's cross-examination he was asked if he could identify the man he testified he had seen coming down the rear stairs supposedly from the Freeny apartment and he said that he could. Joe Hollyfield was brought into the courtroom and Thompson was asked, "Is that the man that you saw coming down that stairway?" In reply he testified, "That appears to be the man that I saw." It appears from other testimony in the record that plaintiff suspected Hollyfield of being intimate with defendant.

Hollyfield was employed as a dining car waiter. It was definitely established by his testimony and that of one of his superiors and the records of the New York Central System that he was not in Chicago on the night in question but was on a regular Boston run on said railroad. At the particular time involved herein his train was enroute from Boston to Chicago

sure. They both testified that they were in Jackson's car when he parked in front of 1212 with Pickney from about 9 P.M. until 11 P.M. on this night. Jackson further testified that about 11 P.M., while he had Pickney with him in his car, he met a man, who introduced the man to him as Jackson's friend. Pickney, previous and after the incident had to the Grand Jury testified otherwise; this he (Pickney) put out of his car, returned the man, and then plus the Jackson said he operating that he then disappeared in Pickney's automobile that he was violating and the driver in front of the building when Grand Jury P.M.) that he then went to the rear of the building but was-closed Jackson in front at home; that light included in the light in the kitchen of the 1st floor occupied where the Tenant lived; and that he then driven by the city police and was the same ~~Lena~~ coming down the stairs like he had been inside the building when it P.M.

In the course of Jackson's cross-examination he was asked if he could identify the man he introduced as that man having been where the same witness testified in the Grand Jury and he said that he could. The prosecution then brought into the courtroom and Jackson was asked, "Do you see that man you called when that intimacy?" to reply he identified, that appears to be the man that I saw." It appears from other testimony in the record that identity identical individual or being intimate with Jackson.

Pickney was examined in a similar way which, it was particularly emphasized in the testimony and that of the 1st Lieutenant and the testimony of the Chief Detective that he was not in Jackson's car during the period in question but was at a regular Tavern from 9P. until midnight. If the prosecution claimed Jackson lived with Lena and intimate from Pickney to testify

and was scheduled to arrive in Chicago at 11 A.M., March 8, 1945. Hollyfield testified further that he never had sexual relations with defendant; that he was never in her apartment; and that he did not go down the rear stairway from her apartment either on the night of March 7, 1945 or in the early morning of March 8, 1945.

Grant E. Jackson testified in plaintiff's behalf that he was "parked in front of 4716 on March 7, [1945] around nine o'clock in the evening with Milton Thompson, and a little later, a gentleman walked up in the courtway and Milton got out to see who it was *** after Mr. Thompson left me, Mr. Rows and Mr. Freeny came back between eleven-twenty and eleven-thirty, and Milton then proceeded to go around to the rear of the house, and I went up to the front, and we had waited downstairs for a few minutes before going upstairs *** I followed Mr. Freeny *** after we got upstairs, he took his keys out and proceeded to unlock the two locks that were on the door, when, on opening the door, he found there was a night latch *** I heard a woman's voice holler, 'Freeny,' and she said, 'Who is it?' He said, 'Freeny,' and she said, 'Just a minute' *** it was about five to seven minutes, I guess, that the party came and opened the door *** between that time, I heard a voice holler, 'Hurry, hurry, hurry.'"

Defendant testified that she had been employed during practically all her married life; that she was manager of the Adeline Ladies Apparel Shop at 413 E. 47th street and had held that position for eight years; that she did not commit adultery with Joe Hollyfield on the night of March 7, 1945; that she had not committed adultery with anyone at any time or place since her marriage; that she had the burglar chain on the front door of her apartment on the early morning of March 8, 1945; that she heard somebody at the front door between 12 and 12:15 A.M.

and was scheduled to arrive in Chicago at 11 a.m., March 5, 1941. Multiplied inquiries further fail to show that social relations with defendant, that he was known in his apartment, and that he did not go home for most evenings from his place of employment either on the night of March 3, 1941 or in the morning of March 4, 1941.

Since T. Thomas testified to plaintiff's behalf that he was "passed in front of 4711 on March 3, [1941] around nine o'clock in the evening with Victor Thompson, and a little talk, a problem raised up in the neighborhood and Victor got out to see what it was and after he, Thompson left me, I, T. Thomas had to, Thomas made that history clear[illegible], and after that I went on to the home, and we had social conversation for a few minutes before going upstairs and I departed at. Thomas was alone at my apartment, in fact the lady had done provided to unlock the door that was on the door, then, in opening the door, he found known but a light [illegible] I heard a woman's voice saying, 'Thomas,' and the lady, 'The is Eddie Ray,' 'Thomas,' and the lady, 'Have a chance we to see about this to some extent,' I guess, that the lady came and opened the door and helped that day, I heard a voice saying, 'Thomas, Thomas, Thomas.'"

Defendant insists that he had been employed during practically all her married life; that she was manager of the Eddie Taylor Apparel Shop at 4711 [illegible]; that there was her held that position for eight years; that she did her duties satisfactorily with the exception on the night of March 3, 1941; that she had not committed adultery with anyone at any time or place during her marriage; that she had the morgue photo on the front door of her apartment on the night according of March 5, 1941; that she heard screaming at the front door between 12 and 1:00 a.m.,

and she asked who it was; that her husband said "It is me, Freeny"; that she took the chain off immediately and let him in; that there was no one except herself in the apartment that night; that "there were no glasses around at all"; that she had locked the back door before retiring; and that she was in bed alone when her husband came to the door.

The only question presented for our determination is whether the decree and the findings contained therein were against the manifest weight of the evidence.

Plaintiff had been absent from the city for about two months and his wife did not know when he would return. Unknown to her she was under surveillance by private detectives employed by him for about a month prior to March 7, 1945. If defendant had been guilty of any improper conduct during that period, Hargraves' operators would surely have observed it and testified accordingly. But the net result of their month's surveillance is the incident testified to by them and plaintiff as having occurred on the night of March 7, 1945 and the early morning of March 8, 1945.

Freeny's testimony does not disclose a single suspicious circumstance in or about the apartment when he entered same except that he claims to have found the rear door unlocked. His wife denied that it was, unless he unlocked it himself. It was only natural for her to lock and chain both doors, being alone in the apartment, as she asserted, and having no knowledge that her husband had returned to the city or that he would come to their home on the night in question. It is true that plaintiff and Jackson, the private detective, testified that defendant did not open the door for six or seven minutes and that Jackson claimed that he heard a woman inside the apartment say, "Hurry, hurry, hurry." Both plaintiff and Jackson heard the defendant ask, "Who is it?" But plaintiff, who was

closer to the door than Jackson, did not here his wife say, "Hurry, hurry, hurry." Defendant denied Jackson's testimony in this regard. She also denied the testimony of both plaintiff and Jackson that she delayed several minutes in opening the door. She said that she opened the door immediately when she ascertained that it was her husband but, even though she did delay a few minutes in opening the door, it would have been only natural under the circumstances. If Freeny found the rear door unlocked, as he claims, and suspected that Hollyfield went out that door while he was delayed in getting into the apartment through the front door, it is difficult to understand why he made no attempt to pursue Hollyfield down the rear stairway, knowing, as he did, that his detective Thompson was guarding that stairway. It is strange indeed that plaintiff, expecting to find Hollyfield in the apartment with his wife, did not have his attorney and his private detective Jackson or either of them accompany him inside the apartment. They were both available. He said that Jackson went as far as the apartment door with him but there is no evidence in the record that Jackson entered the apartment. The attorney who represented Freeny at the trial arrived at the premises with him about 11:20 P.M. But it does not appear what happened to him thereafter. It would seem that plaintiff would want to have both Jackson and his attorney along with him when he entered the apartment for protection or to apprehend the suspected culprit. In any event, it is reasonable to assume that he would at least want some corroboration for what he expected and hoped to find in the apartment. Instead of going into the apartment with Freeny, when defendant opened the door, Jackson just disappeared from the picture.

Freeny's private detective Thompson was the only witness who testified as to a man entering defendant's apartment or

closer to the door than Dorothy, who was now his only ally, "Carry, Carry, carry." Nevertheless Gaston's predicament is this respect. She also found the testimony of Dr. Glaisher alit and declared that she accepted several chances to speculate the door. He said that she found the lure incredibly from the misunderstand that it was her mission and, even though she did delayed the murder in spending far longer, it would have been only method using the circumstances. At common law the same motives, or lack thereof, and arguments that convicted Gaston that night would be not relevant in certain ways the equivalent through the French law, it is sufficient to conjecture may be made as evidence to persons motivation case the jury instructed, however, to be sure, that the evidence therefore was questionable that matter. It is strange indeed that plausibility, attaching to those motivated in the equivalent with his wife, his not have his attorney and his property individually chosen to relieve of these accompanying was inside the courtroom. They were then available. He said that Jackson must be for to the equivalent door which his been in an matter to the present that jurisdiction between the underhand. The attorney was representative trying as the trial evidence of the problem with the what it is, but it does not appear what happens to him thereafter. It would have that plaintiff would not to have said further and his attorney since with the case be received the equivalent for participation or to questioned the suspected subject. In any event, it is reasonable to assume that he which it least was some contribution for that he appeared and equal to that in the equivalent. Instead of going into the courtroom with Dorothy, when defendant opened the door, Jackson just disappeared from the picture.

Dorothy's private interview therefore was the only witness who testified as to a not material statement's equivalent or

leaving same. As already shown, he testified that the man he saw pushing the Freeny bell in the apartment building entrance and being admitted to the stairway leading to said apartment was the same man he had previously seen with the defendant; and that the man he saw on the rear stairway that serves the Freeny apartment was the same man he seen pushing the Freeny bell in the front entrance. The Freeny apartment was on the 3rd floor. Thompson said that he was on guard in the rear of the building for more than an hour when he saw a light at the rear of the Freeny apartment; that he then started up the rear stairs and a man passed him coming down; that it was dark but that he saw the man's face. He did not testify that the man he claims to have seen coming down the rear stairway came out of the Freeny apartment and it may well be that the light he saw in the rear of the 3rd floor apartment was turned on by plaintiff when he was making his search of said apartment. Thompson's identification of Hollyfield as the man he saw pass him on the rear stairway completely destroyed any probative force his testimony might otherwise have had, when it was conclusively shown that Hollyfield was on a train traveling from Boston to Chicago at the time in question and that that train did not arrive in Chicago until 11 A.M. on March 8, 1945.

We will now consider the evidence pertaining to defendant's purported acts of adultery in June, July and August, 1936. It will be noted that she was not charged with these specific acts in the original complaint and that they were supposed to have been committed more than nine years before the amended complaint was filed. The only witnesses who testified in plaintiff's behalf as to the acts of adultery alleged to have been committed by defendant in the summer of 1936 were Beulah C. Ford and Lemuel Durley.

Mrs. Ford testified that she lived at 455 East 46th street

[illegible] [illegible]. [illegible] [illegible] [illegible]

during the summer of 1936; that Lemuel Durley was an instructor at bridge; that he came to her home every Sunday afternoon during that summer and instructed a bridge class of from four to six persons for a period of from two to three hours; that one Sunday afternoon in June, while Durley was instructing his class, a man rang her doorbell; that he was admitted by one of her roomers, Gladys Johnson, who introduced the man to her as Bob Adams; that shortly after the arrival of Adams, Mrs. Freeny came to her home and was admitted by Gladys Johnson; that that was the first time the witness met Mrs. Freeny; that the defendant sat on a couch talking to Adams for a short time and that she and Adams then went into Gladys Johnson's bedroom; that they closed the door of the room and remained there for a period of from two to four hours; that this bedroom was adjacent to the room where Durley was instructing the bridge class; and that defendant met Bob Adams at her home on seven other Sunday afternoons during the summer of 1936 and entered the same bedroom with him in her presence and in the presence of Durley and his bridge class.

Lemuel Durley testified to the same effect as Mrs. Ford except that he stated that she told him that the name of the man with the defendant on each of the aforesaid occasions was Bob Martin.

According to Mrs. Ford, she did not tell plaintiff of the misconduct of his wife in her home until about five days before the trial. Durley testified that he apprised Freeny of the purported occurrances in Mrs. Ford's home about six months before the trial.

Gladys Johnson testified in defendant's behalf that she did not move to Mrs. Ford's home until the fall of 1937 and that she lived there a little over a year; that she did not know Mrs. Freeny in 1937 and 1938; that defendant never visited

During the summer of 1930, Lord Lonsdale, Sidney has an interesting of writing that he hope to be home before Sidney returns. Sidney returns that summer and interviewed a strange letter of from your to six persons for a period of four hours to close secrecy that one Sidney returns to home. Sidney was interviewed his claim. A man read his testimony that is was satisfied by some of her memory. Sidney replied, she interpreted the use to her as her Sidney that security after the arrival of Johnny. Mrs. Sidney come to his home and was satisfied by Sidney telling that just was the first time the signal was. Sidney that he interpreted not be as a means letting to stand for a short time and that the lid blown been said Mrs. Sidney Johnson's testimony that were closed the door of the room and remained there for a period of three hrs to read testimony that that Sidney was allowed to be read. Sidney was interpreted the strange signal and that interpreted not that there is her been no means other Sidney's time based stated the version of 1930 and without his mean between with his in her presence and in the presence of Sidney and his strange state.

Second Sidney testified to the same effect as Mrs. Ford answer that to which that was 1931 the time the same of the and with the interpreted to such of the Johnson's testimony was not truth.

Interpreting in the, Mrs. Sidney, she testified that Sidney of the attendant of his wife to her room until about five days before the trial. Sidney testified that he received letter of the proposed testimonies in the. That's been about six months before the trial.

Sidney Johnson testified to Johnson's testimony that she did not move to the. Sidney been until the fall of 1927 and that the lived there a little over a year that she did not leave Mrs. Sidney in 1927 and stated that interpreted never visited

her at the Ford home and that she did not know or meet Mrs. Freeny until 1939. Defendant testified that she did not know Gladys Johnson in 1936 and first met her in 1938 or 1939 and that she knew Mrs. Ford only by sight and had never met her or been in her home.

The testimony of Mrs. Ford and Durley is not only highly improbable but fantastic and absurd. According to both of them, defendant and a man went to the home of Mrs. Ford who had not theretofore known either of them, defendant and this man retired to a bedroom in the presence of six or eight persons and remained in same for two or three hours and defendant and the same man repeated this performance under identical circumstances on seven other Sunday afternoons in the summer of 1936. The one material respect in which the testimony of these witnesses differs is that Mrs. Ford stated that Bob Adams was the man with defendant and Durley claims that Bob Martin was the man. Defendant certainly could not have been the paramour of both of these men on the same eight occasions.

"It is a well settled principle that where a decree depends entirely upon the facts and the evidence heard in open court, the chancellor is in a better position than the reviewing court, by reason of his opportunity to observe the witnesses and their demeanor while testifying, to weigh the evidence, and his decision will not be disturbed unless it is palpably against the weight of the evidence." Broczynski v. Schultz, 381 Ill. 86.

In view of the nature and character of the testimony presented in plaintiff's behalf, most of which must have appeared to the chancellor as pure fabrication, it certainly cannot be said that the decree was against the manifest weight of the evidence.

The decree of the Circuit court of Cook county is affirmed.

DECREE AFFIRMED.

Friend and Scanlan, JJ., concur.

law at the Yale Bar and that she did not leave or work for Yeager until 1939. Defendants testified that she did not know Gladys Johnson in 1930 and that had her in 1938 or 1939 and that she knew not, that only by sight and had never met her or been in her home.

The testimony of Mrs. Ford and Darling is not only directly probative but Darling's and Johnson, however, to work or them, defendant and I was next to the time of Mrs. Ford who had met there before known either of them, introduced and this was evidence to a witness in the presence of his e. Right witness and presented to have for Mrs to there before and introduced and the back was repeated this performance under identical circumstances on seven other identity occasions in the summer of 1938. The one substantial respect in which the testimony of these witnesses differs is that Mrs. Ford stated that the woman was the man with Johnson and Darling stated that the woman was the man. Defendant contendedly would not have been the presence of both of them and so the same right occasions.

"It is a well settled principle that where a witness having entirely upon the facts and the evidence based in open court, the chancellor is in a better position than the reviewing court, by reason of his opportunity to observe the witnesses and their demeanor while testifying, to weigh the evidence, and his decision will not be disturbed unless it is manifest against the weight of the evidence." Greenwald v. Mobile, 101 Fla. 1.

In view of the nature and character of the evidence presented in plaintiff's behalf, most of which was not here approved by the chancellor as prove defendants, it certainly cannot be said that the decree was against the manifest weight of the evidence.

The decree of the circuit court of Dade county is affirmed.

Affirmed.

Tilson and Terrell, JJ., concur.

43608

STEVE GUVO, Appellee,	)	
v.	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
FRANK BANIS, Appellant.	)	

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff was struck by defendant's automobile and severely injured. In his suit for damages he alleged negligence, as well as wilful and wanton misconduct on the part of defendant in the operation of his car. The jury returned a verdict finding defendant guilty and assessed plaintiff's damages at the sum of $3228, and in response to a special interrogatory submitted by plaintiff, they found that defendant was guilty of wilful and wanton conduct as alleged in the complaint, that such conduct proximately caused the injuries complained of by plaintiff, and that malice was the gist of the action. Accordingly the court entered judgment against defendant in the amount of the verdict, plus costs, and incorporated in the judgment order a finding that malice was the gist of the action. Defendant appeals.

The accident occurred at Wood and 22nd streets in Chicago, Illinois. Plaintiff was employed about two or three blocks south of the site of the accident, and was about to board a car at the foregoing intersection at approximately 4:00 o'clock in the afternoon on March 7, 1941. The street car was proceeding eastward on 22nd street on the southern of two street car tracks near the intersection of Wood street. A truck was parked parallel with and close to the south curb, and the front of the truck was about even with the west crosswalk of Wood street. Behind that truck was parked an automobile, then after an open space of a few feet, another automobile was parked. The dis-

4502

STATE OF ILLINOIS,
)
)
)
v.
)
FRANK BRETT,
)

No. 17771; Writ of Error to the Criminal Court of Cook County.

Plaintiff was injured by defendant's automobile and brought suit to recover damages for personal injuries, as well as alleged wrongful disconnect on the part of defendant in the operation of his car. The jury returned a verdict finding defendant guilty and assessed plaintiff's damages at the sum of $[illegible], and in response to a special interrogatory submitted by plaintiff, they found that defendant was guilty of willful and wanton conduct as charged in the complaint, that such conduct proximately caused the injuries complained of by plaintiff, and that notice was the cause of the collision. Accordingly the court entered judgment on that verdict, and incorporated in the judgment order a finding that notice was the cause of the action. Defendant appeals.

The accident occurred at Wood and Iowa streets in Chicago, Illinois. Plaintiff was crossing Iowa on the Wood block south of the site of the collision, and was about to board a car at the corresponding intersection of Wood and Iowa streets in the afternoon on March 7, 1921. The street car was proceeding eastward on Iowa street on the southern of the street car tracks near the intersection of Wood street. A truck was parked parallel with and close to the south curb, so the front of the truck was about even with the east crosswalk of Wood street. Behind that truck was parked an automobile, then after an open space of a few feet, another automobile was parked. The dis-

tance from the curb to the south track was about 14 feet.

Plaintiff contends that at the time of the accident the street car was stopped to receive or unload passengers, and that as he was about to proceed to the rear end of the street car, plaintiff's automobile passed, at an excessive rate of speed, between the parked truck and cars, and the street car, a very narrow space, without sounding its horn, struck plaintiff, and then came to a stop at the center of the intersection of 22nd and Wood streets. Defendant, on the other hand, contends that his automobile had already passed the street car at the time of the accident, and states that he was driving only about 10 miles an hour. His version is that plaintiff was running to board the car, and was himself not only contributorily negligent but guilty of wilful and wanton conduct. Defendant conceded on oral argument that plaintiff made out a prima facie case on the negligence count, but not on the count as to wilful and wanton conduct.

The testimony of the several witnesses who testified for the respective parties may be summarized as follows. Plaintiff stated that he was 60 years old at the time of the trial, and had for 32 years worked for the American Car and Foundry Company; that on the day in question he approached 22nd and Wood streets with the intention of boarding a street car on his way home; that when he arrived at 22nd street he found that his street car had stopped, the front door was open and a passenger was waiting to alight. He testified that "I started to run a little faster and get in the rear, in the back car and get on the car. * * * When this auto hit me I was about 10, feet, 10, 15 feet west of the front end of the car," and he stated that when he first saw defendant's automobile it was about four or five feet in front of him, traveling eastward. When asked if he

thing from the car in the south bound one-way L.A. Ford.

Plaintiff testified that, at the time of the accident the school car was stopped to permit an alleged passenger, and that he was about to proceed to the right and of the street car, plaintiff's automobile passed, on the passenger side of the school car, between the parked car and the school car, a very narrow space, without sounding the horn, warning plaintiff, and then came to a stop at the corner of the intersection of Cahuenga and Ventura. Defendant, on the other hand, contends that his automobile had already passed the front car at the time of the collision, and that he was driving only about 10 miles an hour. The testimony of both plaintiff was tending to bolster the car, and his testimony tend only contributorily negligent but guilty of wilful and wanton misconduct. Defendant contended on oral argument that plaintiff, when on a prima facie case on the negligence count, had fed on the credit as to wilful and wanton misconduct.

The testimony of the several witnesses was conflicted for the respective parties may be summarized as follows. Plaintiff stated that he was 40 years old at the time of the trial, and had for 20 years served for the municipal fire and ambulance service; that on the day in question he was driving home and had stopped with the intention of turning [illegible] and that upon; that when he arrived at Ventura he found that his street car had stopped, the front door was open and a passenger was waiting to alight. He testified that "I started to turn a little faster and get in the rear, in the back door and get on the car. [illegible] I was only just to [illegible] left, 10, 12 feet west of the front end of the car," and he stated that when he first saw defendant's automobile it was about four or five feet in front of him, travelling eastward. When asked if he

knew how fast the automobile was going, he replied: "Oh, he was going pretty fast all right, but I do not know how many." He added that he tried to get to one side of the machine, but could not do so because the parked cars near the curb left him no place to go. He further stated that he did not hear any horn sounded by the automobile.

Edward Olson, testifying on behalf of plaintiff, stated that he had been a street car conductor for 21 years; that the car on the route in question made a regular stop at Wood street; that at the time of the accident which occurred a few seconds after the street car stopped, defendant's automobile "shot past" the rear of the street car on the right side thereof, at 25 or 35 miles per hour, and finally halted about the center of Wood street.

The defendant, Frank Banis, testified in substance that he first tried to pass the street car at Damen avenue, west of Wood street, but had to stay back because, as he said, "the car might be in a jam. Then I started again between Wolcott and Wood and I passed the street car"; that as he approached Wood street he was not going more than 10 miles per hour, and that the street car was behind him; that he first saw plaintiff when he stepped off from the curbing; that he had his brakes on; that he did not strike plaintiff with the car, but that plaintiff "was just hit on the motion of the car"; that when he passed the street car it was a half block west of Wood street, and that he was then going about 20 miles an hour; that there were parked just to the right of where the accident happened, a truck and a little car, and that the distance between the parked truck and the street car just barely gave him room to get through. Edward Olson, the conductor, contradicted Banis' testimony with reference to passing the street car between Wolcott and Wood streets,

knew how fast the automobile was going; he replied: "Oh, he was going pretty fast all right, but I do not know how many." He added that he tried to get to one side of the machine, but could not do so because the parked car near the curb left him no place to go. He further stated that he did not hear any horn sounded by the automobile.

Edward Olson, testifying on behalf of plaintiff, stated that he had been a street car conductor for 21 years; that the car on the route in question made a regular stop at Wood street; that at the time of the accident which occurred a few seconds after the street car stopped, Iefnaunt's automobile "shot past" the rear of the street car on the right side thereof, at 25 or 35 miles per hour, and finally halted about the center of Wood street.

The defendant, Frank Iefnaunt, testified in substance that he first tried to pass the street car at Lemon avenue, west of Wood street, but had to stay back because, as he said, "the car might be in a jam. Then I started again between Olcott and Wood and I passed the street car"; that as he approached Wood street he was not going more than 10 miles per hour, and that the street car was behind him; that he first saw plaintiff when he stepped off from the curbing; that he had his brakes on; that he did not strike plaintiff with the car, but that plaintiff "was just hit on the motion of the car"; that when he passed the street car it was a half block west of Wood street, and that he was then going about 10 miles an hour; that there were parked just to the right of where the accident happened, a truck and a little car, and that the distance between the parked truck and the street car just barely gave him room to get through. Edward Olson, the conductor, contradicted Iefnaunt's testimony with reference to passing the str et car between Olcott and Wood streets,

and stated that the automobile did not pass the street car in the center of the block.

Edward Aderman, testifying on behalf of the defendant, said that he saw the accident from the front porch of his home, which was located on 22nd street, "the third house west of Wood." He stated in substance that at the time of the accident the street car was about 40 feet behind the automobile; that plaintiff ran directly into the fender of the automobile, which was going about 20 miles an hour and came to a dead stop after the accident.

John Anderson, the motorman of the street car, testifying on behalf of defendant, stated that when he was about 15 to 20 feet west of the Wood street building line an automobile passed him; that a young girl was getting off the street car; that the automobile struck plaintiff at the southwest corner of Wood street; that it had just passed the street car "at the moment just before the accident" but that it did not pass the car in the middle of the block between Wolcott and Wood streets.

Plaintiff presented his case on the theory that defendant, in violation of a city ordinance and the Illinois Motor Vehicles Act (Ill. Rev. Stat. 1945, ch. 95-1/2), passed a standing street car which had stopped to receive or discharge passengers at a street intersection, at a reckless rate of speed, without giving any warning, without keeping a proper lookout and with a total indifference to the consequences of his acts, thereby injuring plaintiff, and that said acts constituted negligence and wilful and wanton conduct. In view of defendant's admission that plaintiff made a prima facie case on the negligence count, the question of contributory negligence is not an issue unless it can be said that plaintiff's conduct also was wilful and wanton. There is a conflict in the evidence on the question as to whether the street car had come to a stop at Wood street or whether, as

and stated that the automobile did not pass the street car in the center of the block.

Edward Bierman, testifying on behalf of the defendant, said that he saw the accident from the front porch of his home, which was located on Wood street, "the third house east of Wood." He stated in substance that at the time of the accident the street car was about 40 feet behind the automobile; that plaintiff ran directly into the fender of the automobile, which was going about 20 miles an hour and came to a dead stop after the accident.

John Anderson, the motorman of the street car, testifying on behalf of defendant, stated that when he was about 15 to 20 feet west of the Wood street building line an automobile passed him; that a young girl was getting off the street car; that the automobile struck plaintiff at the southeast corner of Wood street; that it had just passed the street car "at the moment just before the accident" but that it did not pass the car in the middle of the block between Wolcott and Wood streets.

Plaintiff presented his case on the theory that defendant, in violation of a city ordinance and the Illinois Motor Vehicles Act (Ill. Rev. Stat. 1947, ch. 95-1/2), passed a standing street car which had stopped to receive or discharge passengers at a street intersection, at a reckless rate of speed, without giving any warning, without keeping a proper lookout and with a total indifference to the consequences of his acts, thereby injuring plaintiff, and that said acts constituted negligence and willful and wanton conduct. In view of defendant's admission that plaintiff made a prima facie case on the negligence count, the question of contributory negligence is not an issue unless it can be said that plaintiff's conduct also was willful and wanton. There is a conflict in the evidence on the question as to whether the street car had come to a stop at Wood street or whether, as

defendant contends, he passed the street car in the middle of the block between Wolcott and Wood streets and preceded the street car to the intersection. It will be noted that defendant himself, on cross-examination, admitted that the distance between the parked truck and the street car just barely gave him room to get through, and it is evident that if the defendant had been ahead of the street car at the time of the accident he would have had no such difficulty, because he could have steered his automobile to the left and thus avoided plaintiff, who was either walking or running to board the street car at the rear. Moreover, defendant's testimony that he passed the street car in the middle of the block between Wolcott and Wood streets, is contradicted by his own witness, John Anderson, as well as by plaintiff's witness, Edward Olson, the conductor. There is likewise a conflict in the evidence as to the speed of defendant's automobile at the time of the accident. He said that he was traveling only 10 miles an hour, but the conductor fixed the rate of speed at 25 or 35 miles an hour, and he stated that defendant's car was finally stopped in the center of Wood street. Had defendant been traveling at the rate of only 10 miles an hour, he could have undoubtedly stopped his automobile almost instantly, and if he had preceded the street car to the intersection he would have had plenty of room to turn to the left to avoid the accident. None of the witnesses testified that defendant gave any signal warning.

Under the testimony thus presented it was a question of fact for the jury to determine whether defendant was guilty of wilful and wanton conduct. They heard and saw the witnesses and were the best judges of their credibility. If they were of the opinion that the evidence warranted the finding that the defendant, in violation of a city ordinance and the Motor Vehicles Act, passed a standing street car which had stopped

defendant contend, he passed the street car in the middle of the block between Ellicott and Tod streets and proceeded the street car to the intersection. It will be noted that defendant himself, on cross-examination, admitted that the distance between the parked trucks and the street car just barely gave him room to get through, and it is evident that if the defendant had been ahead of the street car at the time of the accident he would have had no such difficulty, because he could have steered his automobile to the left and have avoided plaintiff, who was either walking or running in front the street car.

Moreover, defendant's testimony that he passed the street car in the middle of the block between Ellicott and Tod streets, is contradicted by his own witness, Miss Andrews, as well as by plaintiff's witness, Edward Olson, the conductor. There is likewise a conflict in the evidence as to the speed of defendant's automobile at the time of the accident. He said that he was travelling only 15 miles an hour, but his witnesses fixed the rate of speed at 20 or 25 miles an hour, and he stated that defendant's car was finally stopped in the vicinity of Tod Street, had defendant been travelling at the rate of only 15 miles an hour, he could have undoubtedly stopped his automobile almost instantly, and if he had proceeded the street car to the intersection he would have had plenty of room to turn to the left to avoid the accident. None of the witnesses testified that defendant gave any sign I recall.

Under the testimony then presented it was a question of fact for the jury to determine whether defendant was guilty of willful and wanton conduct. They heard and saw the witnesses and were the best judges of their credibility. If they were of the opinion that the evidence warranted the finding that the defendant, in violation of a city ordinance and the motor vehicles act, passed a standing street car which had stopped

to receive or discharge passengers, at a reckless rate of speed, without keeping a proper lookout, without giving any warning, and with a total indifference to the consequences of his act, their response to the special interrogatory was justifiable. The most that can be said in favor of defendant's contention is that the evidence was conflicting. In such cases the courts have in recent decisions held that a verdict will not be disturbed "unless the finding is clearly wrong, * * * and where the evidence is conflicting the verdict will not be set aside even though it may be against the weight of the evidence." Corcoran v. City of Chicago, 373 Ill. 567. In Trust Co. of Chicago v. Ancateau, 317 Ill. App. 186, the court said that "a verdict will not be set aside * * * as being against the weight of the evidence, unless it is against the manifest weight of the evidence. [Citing the Corcoran case.] In suits at law, where there is a conflict in the testimony, it is for the jury to weigh and determine the evidence admitted by the court as competent."

With respect to the contention that plaintiff himself was guilty of such negligence or wilful and wanton conduct as would bar recovery, it should be noted that according to his contention he was approaching a standing street car for the purpose of boarding it, and had a right to expect that approaching vehicles would obey the law and stop to permit him to get on the street car. Chicago City Ry. Co. v. Fennimore, 199 Ill. 9. It must be conceded, of course, that whether plaintiff was guilty of contributory negligence or wilful and wanton conduct was a question of fact for the jury. Habenstreit v. City of Belleville, 302 Ill. App. 383. The law is also well established that contributory negligence is no defense where a defendant is found to be guilty of wilful and wanton conduct. Reell v. Central Ill. Electric & Gas Co., 317 Ill. App. 106.

to proceed on dangerous crossings, at a reckless rate of speed, without sounding a proper signal, without giving any warning, and with a total indifference to the consequences of his act, their response to the social interdependency was justifiable. The most that can be said in favor of defendant's contention is that the evidence was conflicting. In such cases the courts have in recent decisions said that a verdict will not be disturbed "unless the finding is clearly wrong, * * * and where the evidence is conflicting the verdict will not be set aside even though it may be against the weight of the evidence." Corcoran v. Interurban, 177 Ill. App. 24. In Ernst Co. v. Roberts v. Gardner, 97 Ill. App. 4, the court said that "a verdict will not be set aside * * * as being against the weight of the evidence, unless it is against the manifest weight of the evidence. [Citing the Corcoran case.] In ancient at law, where there is a conflict in the testimony, it is for the jury to weigh and determine the evidence adduced by the court as correct."

With respect to the contention that plaintiff himself was guilty of such negligence as would go to bar recovery, it should be noted that evidence in the contention he was approaching a standing street car for the purpose of boarding it, and had a right to assume that approaching vehicles would obey the law and stop to permit him to get on the street car. Chicago City Ry. Co. v. Tomlinson, 193 Ill. 2. It must be conceded, of course, that whether plaintiff was guilty of contributory negligence in failed and motion against was a question of fact for the jury. Wisnewski v. City of Belleville, 302 Ill. App. 30. The law is also well established that contributory negligence is no defense where a defendant is found to be guilty of willful and wanton conduct. Hall v. Central Ill. Electric & Gas Co., 277 Ill. App. 106.

Lastly it is urged that the court erred in giving and refusing certain instructions. One of the instructions which defendant complains of is plaintiff's instruction No. 7. This instruction charged the jury that if they found from the evidence and the instructions of the court that defendant was guilty of wilful and wanton or malicious conduct in the operation of his automobile at the time of the occurrence, then they could not take into consideration the question of contributory negligence. We understand this to be a correct statement of the law, and find no reason why the judgment should be reversed by reason thereof. Defendant also complains because the court modified his instruction No. 9, which reads as follows, by striking out the last sentence thereof: "You are instructed that if you believe from the evidence that the plaintiff, Steve Guvo, and the defendant, Frank Banis, each were guilty of negligence which proximately contributed to the damages or injuries complained of then you have no right to compare the negligence of such plaintiff, Steve Guvo, with that of the defendant, Frank Banis, and find a verdict according to which side you think was guilty of the greater degree of negligence, for in such case it is the law that it makes no difference which side was guilty of the greater degree of negligence. Under such circumstances the plaintiff cannot recover." This instruction was not limited to the first count in the complaint, and as to the second count it was erroneous because, as heretofore stated, contributory negligence is not a defense to wilful and wanton conduct. We have examined other instructions complained of, and find that they were not prejudicial or of such character as to warrant a reversal.

For the reasons indicated, the judgment of the Circuit court should be affirmed, and it is so ordered.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

Lastly it is urged that the court erred in giving and refusing certain instructions. One of the instructions which defendant complains of is plaintiff's instruction No. 7. This instruction charged the jury that if they found from the evidence and the instructions of the court that intoxicated was guilty of willful and wanton or malicious conduct in the operation of his automobile at the time of the occurrence, then they could not take into consideration the question of contributory negligence. We understand this to be a correct statement of the law, but find no reason why the judgment should be reversed by reason thereof. Defendant also complains because the court modified his instruction No. 1, which read as follows, by striking out the last sentence thereof: "You are instructed that if you believe from the evidence that the plaintiff, Steve Davo, and the defendant, Frank Smith, both were guilty of negligence which proximately contributed to the injuries complained of then you have no right to consider the negligence of such plaintiff, Steve Davo, with that of the defendant, Frank Smith, and find a verdict according to which of you think was guilty of the greater degree of negligence, for in such case it is the law that if either or both were guilty of the greater degree of negligence, then such circumstances the plaintiff cannot recover." This instruction was not limited to the first count in the complaint, and so the second count is an erroneous bowing, in particular stated, contributory negligence is not a defense to willful and wanton conduct. We have examined other instructions complained of, and find that they were not prejudicial or of such character as to warrant a reversal.

For the reasons indicated, the judgment of the circuit court should be affirmed, and it is so ordered.

AFFIRMED.

Guilfoyle, P. J., and Burke, J., concur.

43673

R. D. CUNNINGHAM, Appellee,

v.

WILLIAM P. CAGNEY, Appellant.

APPEAL FROM MUNICIPAL COURT OF EVANSTON, COOK COUNTY.

330 I.A. 244

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Robert D. Cunningham had judgment against the defendant, William P. Cagney, the appellant, in the sum of $1750 for commission found to be due him for procuring a purchaser who was ready, willing and able to buy Cagney's home in Evanston upon terms and conditions agreeable to Cagney.

Defendant had resided at 1046 Sheridan road, Evanston, for many years, but the death of his wife and the contemplated marriage of his daughter would have left him alone with one unmarried son, and he therefore decided to dispose of his home which no longer suited his needs. Accordingly he listed it with Baird & Warner, Coopers, Hokanson & Jenks, and McGuire & Orr, real estate agents in Evanston. Plaintiff was a licensed real estate broker employed by the latter firm, and had known defendant for about 18 years. He testified that on June 26, 1944 he called on defendant by request to discuss with him the sale of his home. They talked about values in that district and "before we got through talking we arrived at a figure of $35,000.00." Plaintiff told defendant that the high taxes on the property, which were approximately $800, made it difficult to sell, and suggested that defendant make an effort to have the taxes reduced. Plaintiff then wrote up the listing and placed it in the files of McGuire & Orr. Defendant objected to giving any real estate agent an exclusive listing, and McGuire & Orr would not advertise at their own expense unless they had an exclusive; therefore after placing only two advertisements for the sale of the house, nothing

more was done until October 1944. Plaintiff testified that in the interim, between June and October, he took inquiries on other advertisements in an effort to find a purchaser for Cagney's home, and worked on the matter constantly, that defendant called him at least once a week and his daughter telephoned about twice a month. In the fall of 1944 defendant told plaintiff that he "was not getting enough action" in the matter, and plaintiff then advised him that there were "two things wrong. Your taxes are too high and inasmuch as you would not sign an exclusive for McGuire and Orr, I could not expect them to continue to pay for ads." Defendant commented: "That's all right, you are going to have it and I want you to keep on working at it." As a result he induced McGuire & Orr to start advertising again in October, after which they inserted 23 advertisements. Later defendant told plaintiff that he had made arrangements to have his taxes reduced to around $600, and as plaintiff stated, "I kept working on one prospect after another and Mrs. Larson, who is employed by McGuire and Orr, was also showing the house." Finally in February 1945 plaintiff procured from Milton Wilker a written offer of $30,000. He considered it too low, and called to make an appointment for Wilker with defendant at his home, where plaintiff, defendant and Wilker had a conversation, the material portions of which, as testified to by plaintiff, were as follows: "Mr. Cagney proceeded to tell Mr. Wilker the value of the house and during the conversation I asked Mr. Wilker would he pay Mr. Cagney $35,000.00. He said, 'Well, will you take $35,000.00?' and Mr. Cagney said, 'Yes.' That was the price Mr. Cagney and I had agreed upon and when Mr. Wilker said he would pay the $35,000.00 Mr. Cagney agreed to accept $35,000.00. The next thing Mr. Wilker said: 'Well, that will include that icebox and stove?' Mr. Cagney said, 'Yes.' Wilker said, 'I will

more was done until October 1944. Plaintiff testified that in the interim, between June and October, he took inspection on other advertisements in an effort to find a purchaser for Dagney's home, and turned on the matter successfully. Each defendant called him at least once a week and his daughter telephoned about twice a month. In the fall of 1944 defendant told plaintiff that he was not getting enough action in the matter, and plaintiff then believed that there were two things wrong. Your terms are too high and therefore you would not sign an exclusive for anything and they, I could not expect them to continue to pay for ads." Defendant responded: "That's all right, you are going to have it but I want you to keep on working at it." As a result of Dagney's efforts to start advertising again in October, before which they inserted 15 advertisements. Later defendant told plaintiff that he had made arrangements to have his house realized to around $600, and as plaintiff stated, "I went ahead on our present after another and Mrs. Larson, who is employed by Bradley and Orr, was also showing the house." Finally in February 1945 plaintiff procured from Milton Miller a written offer of $35,000. He considered it too low, and failed to make an appointment for Miller with defendant at the house, where plaintiff, defendant and Miller had a conversation, the material portions of which, as testified to by plaintiff, were as follows: "Mr. Dagney proceeded to tell Mr. Miller the value of the house and during the conversation I asked Mr. Miller would he pay Mr. Dagney $35,000.00. He said, 'Well, will you take $37,000.00?' and Mr. Dagney said, 'Yes.' That was the price Mr. Dagney and I had agreed upon and when Mr. Miller said he would pay the $35,000.00 Mr. Dagney agreed to accept $35,000.00. The next thing Mr. Miller said: 'Well, that will include that icebox and stove?' Mr. Dagney said, 'Yes.' Miller said, 'I will

buy your house at that price provided I can get gas instead of coal because I cannot shovel coal and I wouldn't depend upon a janitor.'" Thereafter plaintiff reported to Mr. McGuire of his firm and Mrs. Larson that he had negotiated a sale providing Wilker could get gas, and that defendant had assured him that this could be done. Subsequently arrangements were made to permit Wilker and his wife to measure the rooms in the Cagney home, and Cagney initiated steps with someone whom he knew at the Public Service Company office to get the priority for gas. Plaintiff testified that both defendant and his son stated they had a friend in the government service through whom they could get the gas priority, and at the son's suggestion the Wilkers signed the required application. Apparently they did not succeed in procuring a priority, for about May 1 plaintiff obtained a priority himself through a friend of his in the government service, and Wilker and the Public Service Company were notified by letter that the priority had been granted. Plaintiff testified that when he called Cagney to tell him that the priority had been obtained from the government and that he was ready to prepare the contract, Cagney said "Fine." Plaintiff prepared the contract about May 21, 1945, and the only items missing were a correct legal description and a document subsequently prepared and introduced in evidence as Exhibit A. When plaintiff called defendant for the legal description, Cagney advised him that he would "have my man Murray read that to you. He will dig up that deed and read it to you."

It appears that Wilker had requested occupancy on August 1, 1945 and desired such provision to be inserted in the deed, but Cagney wanted to remain in his home until August 30, and accordingly Exhibit A, which was prepared by plaintiff and attached to the deed, provided that the Venetian blinds, re-

buy your house at that price provided I can get gas instead of coal because I cannot stand coal and I wouldn't depend upon a janitor." Thereafter plaintiff reported to us, acquire of his fire and gas, inasmuch that he had negotiated a sale providing Miller could get gas, and that defendant had assured him that this would be done. Subsequently arrangements were made to permit Miller and his wife to measure the rooms in the Dagney home, and Dagney initiated steps with someone whom he knew at the Public Service Company office to get the priority for gas. Plaintiff testified that both defendant and his son stated they had a friend in the government service through whom they could get the gas priority, and at the son's suggestion the Miller's signed the required applications. Apparently they did not succeed in procuring a priority, for about May 1 plaintiff obtained a priority through a friend of his in the government service, and Miller and the Public Service Company were notified by letter that the priority had been granted. Plaintiff testified that when he called Dagney to tell him that the priority had been obtained from the government and that he was ready to proceed the contract, Dagney said "fine." Plaintiff prepared the contract about May 21, 1945, and the only items missing were a correct legal description and a document subsequently prepared and introduced in evidence as Exhibit 1. When plaintiff called defendant for the legal description, Dagney advised him that he would "have my man Murray read that to you. He will fix up that deed and read it to you."

It appears that Miller had requested conveyance on August 1, 1945 and desired such provision to be included in the deed, but Dagney wanted to remain in his home until August 31, and accordingly Exhibit 1, which was prepared by plaintiff and attached to the deed, provided that the Wrecker Blinds, re-

frigerator and kitchen stove were to be included as part of the property in the contract, and that in consideration of Wilker's consent to have Cagney retain occupancy until August 30, certain carpets and draperies should also remain on the premises and become the property of the purchasers, and that after transfer of title to Wilker, Cagney would permit the new owner to substitute gas heating equipment and make certain alterations in the plumbing provided the work did not materially inconvenience Cagney's occupancy of the home. Plaintiff testified that on May 21, 1945, after Exhibit A had been prepared and attached to the contract as a rider, he read it, and the salient portions of the agreement, to defendant, who made no objection except as to the date of occupancy, which was later fixed at August 30 at defendant's request.

The contract provided that it should be held in escrow by the State Bank & Trust Company of Evanston, together with the earnest money, and plaintiff states that on May 22 he called defendant by telephone, asking him to come to the bank and arrange for the escrow, at the same time advising him that Wilker would pay the escrow fee. Plaintiff testified: "He [Mr. Cagney] said, 'I am too busy to come up now.' And I said: 'Can I come up and have you sign them?' and he said, 'No, come up the following day.' I called him on the 23rd and he said, 'Wait until Friday. Mr. Dewey at the Edgewater Beach is getting me an apartment and I want to be sure I get it.' On Friday I called him and asked him to let me come down and he said, 'See me Monday.' On Monday he said, 'See me Wednesday. I don't know what I am doing right now. I want to get a house. I want to get an apartment. I want to get something before I sign that paper.' It went from every other day to every three days until June 13. On June 13 I called Bill and said, 'Bill, you must do something about this contract.' He said, 'Well, I don't know what I am

refrigerator and kitchen stove were to be included as part of the property in the contract, and that in consideration of Wilker's consent to have another realty company until August 30, certain carpets and draperies should also remain on the premises and become the property of the purchaser, and that after transfer of title to Gilmer, Gamsey would permit the new owner to substitute gas heating equipment and make certain alterations in the plumbing providing the work did not materially inconvenience Gamsey's occupancy of the home. Plaintiff testified that on May 21, 1947, after Exhibit A had been prepared and attached to the contract as a rider, he read it, and the salient portions of the agreement, to defendant, who made no objection except as to the date of occupancy, which was later fixed in August 30 at defendant's request.

The contract provided that it should be held in escrow by the State Bank & Trust Company of Decatoon, together with the earnest money, and plaintiff testified that on May 22 he called defendant by telephone, asking him to come to the bank and arrange for the escrow, at the same time advising him that Gilmer would pay the escrow fee. Plaintiff testified: "So [Mr. Gamsey] said, 'I am too busy to come up now.' And I said: 'Well I come up and have you sign them' and he said, 'No, come up the following day.' I called him on the 23rd and he said, 'Call until Friday. Mr. Power at the Grocerator Peach is getting me an apartment and I want to be sure I get it.' On Friday I called him and asked him to let me come down and he said, 'See me Monday.' On Monday he said, 'See me tomorrow. I don't know what I am doing right now. I want to get a house. I want to get an apartment. I want to get something before I sign that paper.' It went from every other day to every three days until June 13. On June 13 I called Bill and said, 'Bill, you must do something about this contract.' He said, 'Well, I don't know what I am

going to do. My friends said I would be a fool to sell that house and sit on somebody's doorstep or in a hotel room.'"

The contract was never signed, and thereafter plaintiff wrote defendant several letters dated June 13, 14, 18 and July 2, urging him to carry out his agreement and consummate the sale of the property to the Wilkers upon the terms to which he said Cagney had agreed.

On June 18 Cagney called plaintiff requesting a copy of the contract which he desired to show his attorney, and plaintiff mailed it to him. He states that when he subsequently called Cagney on June 21 he started for the first time to talk about a $3900 rug. He said, "What am I going to do with this $3,900 rug?" Plaintiff replied, "I don't know anybody who wants it, but if it is worth that I will get an appraisal for you," and "I got an appraisal from a rug man. $150.00." Plaintiff could not thereafter contact Cagney on the telephone, but his son Dick requested him to come over and get the contract which had been sent to Mr. Cagney, Sr., and when he called for the document he received from Mr. Murray a letter dated June 26, 1945 and signed by William P. Cagney, which authorized plaintiff "to make following offer to Mr. M. W. Wilker for the sale of residence, 1046 Sheridan Road, Evanston, Illinois and certain personal property therein; one contingent upon the other. The residence property for the sum of Thirty-five Thousand ($35,000.00) Dollars, the sale of which is contingent upon the purchase by the buyer thereof, for an additional Five Thousand ($5,000.00) Dollars, of the following personal property now in the house: All carpets, All fire-place equipment and all electric appliances in connection therewith, All radiator covers, One (1) rug in dining room, All drapes, shades and venetian blinds, China cabinets in dining room, One (1) ice box, One (1) kitchen stove. It is understood that neither the residence nor the

going to do. My friends said I would be a fool to sell that house and sit on somebody's doorstep or in a hotel room.'"

The contract was never signed, and thereafter plaintiff wrote defendant several letters dated June 13, 14, 18 and July 2, urging him to carry out his agreement and consummate the sale of the property to the Villeres upon the terms to which he said Cagney had agreed.

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above mentioned personal property therein will be sold separately, but only together, the residence property for $35,000.00 and an additional $5,000.00 for personal property listed above. Otherwise no sale." This counter-offer materially altered the terms of the original agreement testified to by plaintiff. Upon the trial Cagney denied that he had agreed to sell his home to Wilker for $35,000 in accordance with the provisions of the contract drawn by plaintiff, and Exhibit A attached thereto as a rider, and he now contends that his offer made more than a month after the original contract was drawn by plaintiff, was never accepted by Wilker, and therefore plaintiff is not entitled to commission because he did not procure a purchaser who was ready, willing and able to buy Cagney's home upon terms agreeable to the seller.

The question therefore presented is whether defendant agreed to sell his home upon the terms set forth in the original agreement drawn by plaintiff, and Exhibit A attached as a rider thereto. We have already set forth the salient portions of plaintiff's testimony bearing upon this question. According to both plaintiff and Wilker, Cagney agreed to include, in the purchase price of $35,000, the Venetian blinds, the ice box and the stove. Plaintiff testified that Wilker then asked defendant what he was going to do "with those old carpets and drapes" in the house, and that defendant replied: "There isn't a good piece of carpet around this house except in our library and I have no use for them and I will fix them up for you." Plaintiff continued: "Mr. Wilker said, 'Well, I am willing to pay for them.' I said, 'Listen, it is going to take some time between the contract date and the time of occupancy and let's say, Mr. Wilker, you don't charge Mr. Cagney any rent.' He said, 'That's all right.' * * * Bill asked him if he wanted the drapes in the dining room and Wilker said, 'No.' They talked about new drapes in the son's bedroom and Mr. Wilker

above mentioned personal property therein will be sold separately, but only together, the residence property for $12,000.00 and an additional $3,000.00 for personal property listed above. Otherwise no sale." This counter-offer materially altered the terms of the original agreement testified to by plaintiff. Upon the final inquiry denied that he had agreed to sell his home to Miller for $15,000 in accordance with the provisions of the contract drawn by plaintiff, and initials a attached thereto as a rider, and he now contends that his offer made more than a month after the original contract was drawn by plaintiff, was never accepted by Miller, and therefore plaintiff is not entitled to commission because he did not produce a purchaser who was ready, willing and able to buy property upon terms acceptable to the seller.

The question therefore presented is whether defendant agreed to sell his home upon the terms set forth in the original agreement drawn by plaintiff, and initials a rider attached thereto. We have already set forth the conflict portions of plaintiff's testimony bearing upon this question. Corroborating to both plaintiff and Miller, Gaynor testified to including in the purchase price of $15,000, the lawn mower, the ice box and the stove. Plaintiff testified that Miller then asked defendant what he was going to do with these old trappings and drapes" in the house, and that defendants replied: "Here isn't a good place of output around this house except in our library and I have no use for them and I will sell them to you." Plaintiff continued: "Mr. Miller said, 'Well, I am willing to pay for them.' I said, 'Listen, it is going to take some time between the contract date and the time of accountancy and let's say, Mr. Miller, you don't charge me. Gaynor may want.' He said, 'That's all right.' * * * Still talking in he wanted the drapes in the dining room and Miller said, 'Oh.' They talked about new drapes in the son's bedroom and Mr. Miller

said he didn't want them."

With respect to the discussion of the purchase price, Wilker testified that he asked defendant whether he would accept less than $35,000, and that defendant said "No." Mr. Wilker continued: "And then I was satisfied with that. When he didn't want to accept less than thirty-five, why thirty-five was all right with me. I said, 'That's all right.' Then I said, 'Well, what about the coal? I won't shovel coal on account of my heart and neither can Mrs. Wilker.' So he said, 'We have got a janitor. He has been here for 18 years.' And so I said, 'Yes, but I can't always depend on janitors. I have had janitors before. I would like to have gas.' Mr. Cagney said, 'Well, we will try and get gas for you. I will have my son meet you tomorrow morning at the Public Service and see what we can do.' In the morning Mr. Cagney's son called and said, 'Well, you don't have to come to the Public Service. I will send a man over there.' A man came over to my house."

Testifying in his own behalf, defendant denied that he had agreed to accept $35,000 for his home, but on cross-examination the following questions and answers indicate that his testimony is not at variance with that of plaintiff and Wilker with respect to the purchase price: "[Mr. Cagney]: Mr. Wilker was at my home and I had a conversation with him relative to the house. Mr. Stolle [attorney for plaintiff]: And you heard him say that he said, 'Will you take less than $35,000, Mr. Cagney?' A. He didn't say anything of the kind. Mr. Stolle: I said, you heard him testify, did you not? A. I said, 'I will not take less.' Mr. Stolle: You heard him testify to that, did you not? A. I did not. Mr. Stolle: Did he not say to you at your home, 'Mr. Cagney, will you take less than $35,000?' A. He said,

said he didn't want them."

With respect to the discussion of the purchase price, Wilker testified that he asked defendant whether he would accept less than $34,000, and that defendant said "No." Mr. Wilker continued: "And then I was satisfied with that. When he didn't want to accept less than thirty-five, my thirty-five was all right with me. I said, 'That's all right.' Then I said, 'Well, what about the south - I don't always deal on account of my heart and neither can Mrs. Wilker.' So he said, 'We have got a janitor. He has been here for 15 years.' And so I said, 'Yes, but I don't always depend on janitors. I have had janitors before. I would like to have you.' Mr. Cagney said, 'Well, we will try and get you for you. I will have my son meet you tomorrow morning at the Public Service and see what we can do.' In the morning Mr. Cagney's son called and said, 'Well, you don't have to come to the Public Service. I will send a man over there.' A man came over to my house."

Testifying in his own behalf, defendant denied that he had agreed to accept $35,000 for his home, but on cross-examination the following questions and answers in lieu to that his testimony is not at variance with that of plaintiff and Wilker with respect to the purchase price:

"[Mr. Cagney]: Mr. Wilker was at my home and I had a conversation with him relative to the house. Mr. Stolle [attorney for plaintiff]: And you heard him say that he said, 'Will you take less than $35,000, Mr. Cagney?' A. He didn't say anything of the kind. Mr. Stolle: I said, you heard him testify, did you not? A. I said, 'I will not take less.' Mr. Stolle: You heard him testify to that, did you not? A. I did not. Mr. Stolle: Did he not say to you at your home, 'Mr. Cagney, will you take less than $35,000?' A. He said,

'You will not take less?' And I said, 'No.' Mr. Stolle: All right. And then he said-- A. I said, 'I might consider $35,000.'" Although defendant was apparently reluctant to admit that he had agreed to accept $35,000, his own testimony indicates that he told Wilker that he would not take less than that sum, which cannot be reasonably construed to mean anything other than that he would accept $35,000.

It is not denied that defendant listed his home for sale with the principal real estate agencies in Evanston long before the events herein related, and that he was anxious to sell his home for the reasons indicated. With some of the agencies he listed it at $35,000 and with others at $40,000. If defendant did not agree to accept $35,000 for the premises it is difficult to understand why he should have put himself and his son to the trouble of trying to procure a priority for the installation of gas heat, which was one of the conditions upon which Wilker was willing to pay the stipulated sum. Cagney was reluctant to admit that he had asked his son to assist in procuring a priority for the installation of gas heat. On cross-examination Mr. Stolle interrogated him as follows: "Now then, your son applied to the Public Service Company, did he not? A. I don't know what he did. Q. You told him to, did you not? A. I didn't do anything of the kind. I said, 'Maybe my son might be able to help you.'" But defendant's son corroborated plaintiff's evidence by testifying: "My father told me to see what I could do in regard to getting gas heat. I do not recall that I ever talked to Mr. Wilker."

Defendant's letter of June 26 was clearly an afterthought. It amounted to a counter-offer setting forth terms which had never been mentioned or discussed by the parties prior thereto. Although defendant was anxious to sell his home, the obvious reason for his refusal to carry out his agreement was his in-

'You will not take less?' and I said, 'No.' Mr. Collier: All right. And then he said-- A. I said, 'I might consider $15,000.'" Although defendant was apparently reluctant to admit that he had agreed to accept $15,000, his own testimony indicates that he told Collier that he would not take less than that sum, which cannot be reasonably construed to mean anything other than that he would accept $15,000.

It is not denied that defendant listed his home for sale with the principal real estate agencies in Houston long before the events herein related, and that he was anxious to sell his home for the reasons indicated. With some of the agencies he listed it at $18,000 and with others at $19,000. If defendant did not agree to accept $15,000 for the premises it is difficult to understand why he should have put himself and his son to the trouble of trying to procure a purchaser for the installation of gas heat, which was one of the conditions upon which Collier was willing to pay the stipulated sum. Conley was reluctant to admit that he had asked his son to assist in procuring a purchaser for the installation of gas heat. On cross-examination Mr. Stella interrogated him as follows: "Now then, your son applied to the public service company, did he not? A. I don't know what he did. Q. You told him to, did you not? A. I didn't to anything of the kind. I said, 'Maybe my son might be able to help you.'" But defendant's own corroborated plaintiff's evidence by testifying: "Mr Fischer told me to see what I could do in regard to getting gas heat. I do not recall that I ever talked to Mr. Collier."

Defendant's letter of June 22 was clearly an afterthought. It amounted to a counter-offer setting forth terms which had never been mentioned or discussed by the parties prior thereto. Although defendant was anxious to sell his home, the obvious reason for his refusal to carry out his agreement was his

ability to find suitable living quarters. He evidently tried to find an apartment at the Edgewater Beach Hotel and elsewhere, without avail, and was not willing to sell his home because, as he stated, "My friends said I would be a fool to sell that house and sit on somebody's doorstep or in a hotel room." It was not the purchase price that caused him to change his mind, but the difficulty in the housing situation.

The record discloses that plaintiff worked on this sale for approximately a year, and that his firm placed some 25 advertisements in local papers. The trial judge who heard the witnesses found that plaintiff had procured a purchaser who was ready, willing and able to buy Cagney's home upon terms and conditions agreed to by Cagney, and after a careful examination of the record we are convinced that this finding is abundantly sustained. The law presents no difficult questions. In order for a real estate broker to recover commission, it is incumbent on him to show that he produced a purchaser who was ready, willing and able to perform the contract, and that it was in accordance with the authority given and the terms prescribed. Oliver v. Sattler, 233 Ill. 536. Plaintiff proved his case by the required preponderance of evidence, and therefore we think the finding and judgment of the Municipal Court of Evanston should be affirmed, and it is so ordered.

JUDGMENT AFFIRMED.

Scanlan, J., concurs.
Sullivan, P. J., took no part.

ability to find suitable living quarters. He vainly tried to find an apartment or the operator's small hotel and elsewhere, without avail, and was not willing to sell his home because, as he stated, "My friends said I would be a fool to sell that home and sit in somebody's doorstep or in a hotel room." It was not the purchase price that caused him to change his mind, but the difficulty in the housing situation.

The record discloses that plaintiff served on this sale for approximately a year, and sent his firm places over 27 advertisements in local papers. The trial judge who heard the witnesses found characteristic has proceeded a purchaser who was ready, willing and able to buy upon the terms and conditions agreed to by plaintiff, and after a careful consideration of the record we are convinced that his finding is substantially substantiated. The law presumes no additional premium. In order for a real estate broker to recover commission, it is incumbent on him to show that he produced a purchaser who was ready, willing and able to perform the contract, and that it was in accordance with the authority given and the terms prescribed. Oliver v. Sutton, 223 Ill. 326. Plaintiff proved his case by the required preponderance of evidence, and therefore we think the finding and judgment of the municipal court of Evanston should be affirmed, and it is so ordered.

Affirmed in Error.

Gorman, J., concurs.
Sullivan, P. J., took no part.

43789

79

A. NELSON,
Appellee,

v.

ALLEN BERRY and
KATHERINE BERRY,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

330 I.A. 244

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action in forcible detainer to recover possession of a one-room apartment occupied by defendants. Trial by jury resulted in a verdict and judgment for plaintiff on March 4, 1946. On request of defendants the writ of restitution was stayed for 15 days. Subsequently, on March 19, the court denied a further extension of time, but directed plaintiff's attorney not to execute a writ of restitution for an additional 15 days. In accordance with the direction of the court, the writ was not taken out until April 2. Plaintiff then deposited the required amount of money for the eviction of the tenants who occupied the apartment in question. On April 3, after the writ had been served, the tenants procured a physician's certificate stating that one Catherine Gibson who resided with them at the apartment, was under his care, confined to her bed in defendants' apartment and could not leave for seven days. The bailiff refused to evict the tenants because of the doctor's certificate. Defendants then asked for additional time, which request was denied, and on April 8 they presented a motion to vacate the judgment and a petition in the nature of a writ of audita querela, which the court refused to permit them to file. Defendants appeal from that order.

The salient portions of the petition for the writ are as follows: "Further representing unto this Honorable Court that the Writ of Restitution presently outstanding be stayed

43709

A. ZELNICK,
Appellee,

v.

ALLEN STARK and
MARGARITA MURRY,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE MILNER DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action in forcible detainer to recover possession of a one-room apartment occupied by defendants. Trial by jury resulted in a verdict and judgment for plaintiff on March 4, 1936. On request of defendants the writ of restitution was stayed for 10 days. Subsequently, on March 13, the court denied a further extension of time, but directed plaintiff's attorney not to execute a writ of restitution for an additional 10 days. In accordance with the direction of the court, the writ was not taken out until April 2. Plaintiff then deposited the remained amount of money for the eviction of the tenants who occupied the apartment in question. On April 3, after the writ had been served, the tenants procured a physician's certificate stating that one Catherine Gibson who resided with them at the apartment was under his care, confined to her bed in defendants' apartment and could not leave for seven days. The bailiff refused to evict the tenants because of the doctor's certificate. Defendants then asked for additional time, which request was denied, and on April 6 they presented a motion to vacate the judgment and a petition in the nature of a writ of audita querela, which the court refused to permit them to file. Defendants appeal from that order.

The salient portions of the petition for the writ are as follows: "Further representing unto this Honorable Court that the Writ of Restitution presently outstanding be stayed

and recalled, your petitioners say that after said judgment for possession had been entered in this cause on March 4, 1946, the plaintiff created a new tenancy agreement, by reason of the fact that the plaintiff accepted a certain sum of moneys as the rent for the premises in question for a period up to the THIRD day of April 1946; that by reason thereof, the judgment herein and execution thereon has become satisfied, stayed and otherwise discharged. WHEREFORE, petitioners pray that the judgment herein be vacated and set aside or in the alternative the Court satisfy of record the judgment entered herein, and recall or quash the Writ of Restitution heretofore issued herein."

Audita querela is an ancient common-law writ issued on the application of a judgment or execution debtor, designed to afford relief from the consequences of a judgment or an execution on the ground of some matter of defense or discharge arising subsequent to the rendition of the judgment or the issuance of the execution. 7 C.J.S. Audita Querela, sec. 1. The writ has long been recognized as the proper remedy to avoid an execution which has been sued out after the judgment has been released, paid or satisfied on a prior execution, or where any other matter has occurred which operated as a discharge of the judgment. Pyle v. Crebs, 112 Ill. App. 480, 7 C.J.S. Audita Querela, sec. 2. Proceedings on the writ are in the nature of a new suit, and the writ can be awarded only on motion or petition setting forth the grounds of relief with such certainty as would be good on demurrer. Newhart v. Wolfe, 102 Pa. 561, 6 C.J. p. 856, note 95, Schott v. McFarland, 1 Phila. (Pa.) 53, 7 C.J.S. Audita Querela, sec. 8.

Defendants presented the writ upon the theory that a new tenancy had been created by the acceptance of rent after the entry of judgment giving possession to the landlord, and their

and recalled, your petitioners say that after said judgment for possession had been entered in this cause on March 4, 1946, the plaintiff created a new tenancy agreement, by reason of the fact that the plaintiff accepted a certain sum of money as the rent for the premises in question for a period up to the THIRD day of April 1946; that by reason thereof, the judgment herein and execution thereon has become satisfied, stayed and otherwise discharged. WHEREFORE, petitioners pray that the judgment herein be vacated and set aside or in the alternative the Court satisfy of record the judgment entered herein, and recall or quash the Writ of Possession heretofore issued herein."

Audita querela is an ancient common-law writ issued on the application of a judgment or execution debtor, designed to afford relief from the consequences of a judgment or an execution on the ground of some matter of defense or discharge arising subsequent to the rendition of the judgment or the issuance of the execution. 7 C.J.S. Audita querela, sec. 1. The writ has long been recognized as the proper remedy to avoid an execution which has been sued out after the judgment has been released, paid or satisfied on a prior execution, or where any other matter has occurred which operated as a discharge of the judgment. Pyle v. Crabs, 112 Ill. App. 480, 7 C.J.S. Audita querela, sec. 2. Proceedings on the writ are in the nature of a new suit, and the writ can be awarded only on motion or petition setting forth the grounds of relief with such certainty as would be good on demurrer. Vermont v. Wolfe, 101 Va. 321, 6 S.E. 2d, 816, note 92, Schott v. McFarland, 1 Mills, (Del.) 32, 7 C.J.S. Audita querela, sec. 8.

Defendants presented the writ upon the theory that a new tenancy had been created by the acceptance of rent after the entry of judgment giving possession to the landlord, and their

counsel say that the failure of plaintiff to answer the petition constituted a confession that the allegations therein contained were true. However, plaintiff was not required to answer the petition because the court refused to allow defendants to file it, and we think properly so. The allegations of the petition were clearly insufficient to afford the relief sought. Defendants alleged that the landlord created a new tenancy agreement. The terms of that tenancy were not set forth, nor was there any suggestion as to what kind of tenancy it was. Moreover, they say that plaintiff accepted a certain sum of money, without designating the amount or the person or from whom the money was accepted. These allegations would have been subject to demurrer, and the court was therefore justified in holding that the petition was insufficient and refusing to allow the same to be filed, after more than 30 days had expired since the entry of the judgment for possession. Plaintiff adopted every means possible to evict the tenants without delay from the date of filing the suit to April 8, and was prevented from doing so by a stay of the writ on two different occasions and the presentation of a doctor's certificate which plaintiff characterizes as fraudulent and collusive.

There is no merit in the appeal, and therefore the order of the Municipal Court denying defendants' leave to file their petition is affirmed.

ORDER AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

counsel say that the failure of plaintiff to answer the petition constituted a confession that the allegations therein contained were true. However, plaintiff was not required to answer the petition because the court refused to allow defendants to file it, and we think properly so. The allegations of the petition were clearly insufficient to afford the relief sought. Defendants alleged that the landlord executed a new tenancy agreement. The terms of that tenancy were not set forth, nor was there any suggestion as to what kind of tenancy it was. Moreover, they say that plaintiff executed a certain sum of money, without designating the amount, or the person or from whom the money was accepted. These allegations would have been subject to demurrer, and the court was therefore justified in holding that the petition was insufficient and refusing to allow the same to be filed, after more than 30 days had expired since the entry of the judgment for possession. Plaintiff adopted every means possible to avoid the tenants without delay from the date of filing the writ to April 5, and was prevented from doing so by a stay of the writ on two different occasions and the presentation of a doctor's certificate to the effect plaintiff characterizes as fraudulent and collusive.

There is no merit in the appeal, and therefore the order of the Municipal Court denying defendants' leave to file their petition is affirmed.

OTTO KAUFMANN.

Gilliam, P. J., and Kemble, J., concur.

43804

THE CITY OF CHICAGO, Appellee, v. RAY SAYER, Appellant.	
THE CITY OF CHICAGO, Appellee, v. THEODORE THOMSON, Appellant.	APPEALS FROM MUNICIPAL COURT OF CHICAGO.
THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. RAY SAYERS, Appellant.	
THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. THEODORE THOMPSON, Appellant.	

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The order from which this appeal is taken is precisely the same as the one entered in cause No. 43803, wherein our opinion has this day been filed. The same facts were presented and the same contentions made in both cases. All that we said in our opinion in case No. 43803 applies to this appeal, and for the reasons indicated therein, the judgment or order of the Municipal Court in this cause should be affirmed, and it is so ordered.

ORDER AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

THE CITY OF CHICAGO,
appellee,

v.

RAY SAYER,
appellant.

THE CITY OF CHICAGO,
appellee,

v.

LEONARD FINSEUR,
appellant.

THE PEOPLE OF THE STATE
OF ILLINOIS,
appellee,

v.

RAY SAYER,
appellant.

THE PEOPLE OF THE STATE
OF ILLINOIS,
appellee,

v.

TERRENCE FINSEUR,
appellant.

APPEALS FROM
CONSOLIDATED TRAFFIC
COURT
OF CHICAGO.

MR. JUSTICE STEVENS delivered the opinion of the court:

The order from which this appeal is taken is practically the same as the one entered in cause No. 42,003. Adhering to our opinion in that case, this order must be reversed. The same facts were presented and the same contentions made in both cases. All that we said in our opinion in case No. 42,003 applies to this appeal, and for the reasons indicated therein, the judgment or order of the Municipal Court in this cause should be reversed, and it is so ordered.

Order reversed.

Sullivan, P. J., and Scanlan, J., concur.

43805

THE CITY OF CHICAGO, Appellee, v. RAY SAYER, Appellant.	
THE CITY OF CHICAGO, Appellee, v. THEODORE THOMSON, Appellant.	APPEALS FROM
THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. RAY SAYERS, Appellant.	MUNICIPAL COURT
THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. THEODORE THOMPSON, Appellant.	OF CHICAGO.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The order from which this appeal is taken is precisely the same as the one entered in cause No. 43803, wherein our opinion has this day been filed. The same facts were presented and the same contentions made in both cases. All that we said in our opinion in case No. 43803 applies to this appeal, and for the reasons indicated therein, the judgment or order of the Municipal Court in this cause should be affirmed, and it is so ordered.

ORDER AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

THE CITY OF CHICAGO,
appellee,

v.

MAY SAYLOR,
appellant.

THE CITY OF CHICAGO,
appellee,

v.

THEODORE SCHOLDEN,
appellant.

THE BOARD OF THE STATE
OF ILLINOIS,
appellee,

v.

MAY SAYLOR,
appellant.

THE BOARD OF THE STATE
OF ILLINOIS,
appellee,

v.

THEODORE SCHOLDEN,
appellant.

Opinion from
Criminal court
of Cook.

MR. JUSTICE FRIEDMAN delivered the opinion of the court:

The order from which this appeal is taken is substantially the same as the one entered in docket No. 43305, wherein our opinion was this day upon file. The same facts were presented and the same contentions made in both cases. All that we said in our opinion in case No. 43305 applies to this appeal, and for the reasons indicated therein, the judgment or order of the municipal court in this cause should be affirmed, and it is so ordered.

Order affirmed.

Sullivan, P. J., and Scanlan, J., concur.

43806

THE CITY OF CHICAGO, Appellee, v. RAY SAYER, Appellant.	
THE CITY OF CHICAGO, Appellee, v. THEODORE THOMSON, Appellant.	APPEALS FROM MUNICIPAL COURT OF CHICAGO.
THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. RAY SAYERS, Appellant.	
THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. THEODORE THOMPSON, Appellant.	

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The order from which this appeal is taken is precisely the same as the one entered in cause No. 43803, wherein our opinion has this day been filed. The same facts were presented and the same contentions made in both cases. All that we said in our opinion in case No. 43803 applies to this appeal, and for the reasons indicated therein, the judgment or order of the Municipal Court in this cause should be affirmed, and it is so ordered.

ORDER AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

THE CITY OF CHICAGO,
appellee,

v.

RAY SCOTT,
appellant.

THE CITY OF CHICAGO,
appellee,

v.

THEODORE TROMBON,
appellant.

THE PEOPLE OF THE STATE
OF ILLINOIS,
appellee,

v.

RAY SCOTT,
appellant.

THE PEOPLE OF THE STATE
OF ILLINOIS,
appellee,

v.

THEODORE TROMBON,
appellant.

APPEALS FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE WALKER DELIVERED THE OPINION OF THE COURT:

The order from which this appeal in Case No. 4390b is practically the same as the one entered in Case No. 4390j, wherein our opinion has this day been filed. The same facts were presented and the same contentions made in both cases. All that we said in our opinion in Case No. 4390j applies to this appeal, and for the reasons delivered therein, the judgment or order of the Municipal Court in this cause should be affirmed, and it is so ordered.

ORDER AFFIRMED.

SULLIVAN, P. J., and SCANLAN, J., concur.

43698

330 I.A. 246

B. H. MOLNER,
Appellant,

v.

ROGER T. BEVAN et al.,
Appellees.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

B. H. Molner, plaintiff, appeals from two orders entered by the Circuit court of Cook county. The first, entered September 10, 1945, is as follows:

"On motion of Court, it is ordered that the verdict and judgment heretofore rendered herein on May 23, A. D. 1945, for the sum of $2918.40, be and the same is hereby vacated and set aside.

"Whereupon, the Court finds the issues herein in favor of the defendants, Roger T. Bevan and Marguerite C. Bevan.

"Therefore, it is considered by the Court that the plaintiff take nothing by his said suit and that the defendants go hence without day, and that said defendants do have and recover of and from the plaintiff, B. H. Molner their costs and charges in this behalf expended and have execution therefor."

The second order was entered November 1, 1945, and is as follows:

"This cause coming on to be heard upon motion of plaintiff for a new trial in this cause, said motion being supported by the affidavit of Maurice Weissman [attorney for plaintiff];

"And the Court having considered said motion as aforesaid;

"It is ordered that said motion for new trial be and the same is hereby denied.

4,292

E. H. BOLMER, Appellant,	
v.	SECOND JUDICIAL DISTRICT
EDGAR T. NEVAR et al., Appellees.	COURT OF DOUGLAS COUNTY.

MR. JUSTICE ROSENBLATT DELIVERED THE OPINION OF THE COURT.

E. H. Bolmer, plaintiff, appeals from two orders entered by the District court of Douglas county. The first, entered September 10, 1945, is as follows:

"On motion of counsel, it is ordered that the verdict and judgment heretofore rendered herein on May 24, A. D. 1945, for the sum of $[illegible], be and the same is hereby vacated and set aside.

"Whereupon, the Court finds the issues herein in favor of the defendants, Roger C. Brown and Lawrence E. Nevar.

"Therefore, it is considered by the Court that the plaintiff take nothing by his said suit and that the defendants go hence without day, and that said defendants do have and recover of and from the plaintiff, E. H. Bolmer their costs and charges in this behalf expended and have execution therefor."

The second order was entered November 1, 1945, and is as follows:

"This cause coming on to be heard upon motion of plaintiff for a new trial in this cause, said motion being supported by the affidavit of Maurice Weisman [attorney for plaintiff];

"And the Court having considered said motion as aforesaid;

"It is ordered that said motion for new trial be and the same is hereby denied.

"It is further ordered that the bond of plaintiff upon the appeal as prayed be and the same is hereby fixed at the sum of Two Hundred Dollars ($200.00)."

It is unnecessary for us to consider the order of November 1, 1945, as plaintiff, in his brief, has not questioned the propriety of that order. The sole contention of plaintiff is that the court was without jurisdiction to enter the order of September 10, 1945, because on that date more than thirty days had elapsed from the time of the rendition of the judgment of May 23, 1945.

Defendants contend that the jurisdictional question raised by plaintiff in this court is a mere afterthought and is based upon an insufficient and imperfect abstract of the record and misstatements by plaintiff's counsel as to the actual state of the record. An inspection of the record satisfies us that the contention of defendants is clearly justified. Indeed, after defendants filed in this court their brief and an additional abstract, plaintiff failed to file a reply brief and his counsel did not appear when the case was called for oral argument in this court, although oral argument had been requested by him. The record shows that the judgment order of May 23, 1945, was entered ex parte and that on the same day counsel for defendants served notice on counsel for plaintiff that he would appear in court on the morning of May 24, 1945, and ask leave to file a motion and petition to vacate the judgment entered against defendants on May 23, 1945, and that on this last date the motion to vacate was filed; that the motion was supported by a petition which set forth, in substance, that at the time the case was called for trial on May 23, 1945, counsel for defendants was then subject to call in six cases pending before the Industrial Commission of Illinois and two cases pending in the Municipal

It is further ordered that the bond of plaintiff upon the appeal as prayed be and the same is hereby fixed at the sum of Two Hundred Dollars (200.00).

It is unnecessary for us to consider the order of November 1, 1943, as finally, in the order, has not questioned the propriety of that order. The sole contention of plaintiff is that the court had without jurisdiction to enter the order of September 1, 1943, because on that date more than thirty days had elapsed from the time of the rendition of the judgment of May 23, 1943.

Defendant's contention that the jurisdictional question raised by plaintiff in this court is a new contention and is based upon an insufficient and incorrect statement of the record and misstatements by plaintiff's counsel as to the actual state of the record. An inspection of the record satisfies us that the contention of defendants is clearly justified. Indeed, after defendants filed in this court their brief and an additional abstract, plaintiff failed to file a reply brief and did not appear when the case was called for oral argument in this court, although oral argument had been requested by him. The record shows that the judgment order of May 23, 1943, was entered on **default** and that on the same day counsel for defendants served notice on counsel for plaintiff that he would appear in court on the morning of May 24, 1943, and ask leave to file a motion and petition to vacate the judgment entered against defendants on May 23, 1943, and that on this date the motion to vacate was filed; that the motion was supported by a petition which set forth, in substance, that at the time the case was called for trial on May 23, 1943, counsel for defendants was then subject to call in six cases pending before the Industrial Commission of Illinois and two cases pending in the Municipal

Court of Chicago, that he became engaged in the trial of one of the cases in the Municipal court before Judge Donoghue and that he was engaged in said trial for the entire forenoon of that day; that by reason of the fact that so many cases had to be watched the secretary of plaintiff's attorney missed the call of the instant case before Judge Klarkowski and that case was tried ex parte, with the result that the judgment of May 23, 1945, was entered against defendants. The record further shows that the following order was entered on August 3, 1945: "Maurice Weissman, attorney for plaintiff, and counsel for defendants being present in open court, It is ordered that the above entitled cause shall stand for hearing on August 24, 1945, at the opening of court in the forenoon, without further notice." The record further shows that on August 24, 1945, there was a hearing before the trial court upon the motion of defendants to vacate the judgment of May 23, 1945, at which time counsel for plaintiff appeared and cross-examined witnesses called by defendants in support of said motion; that at the close of the hearing the court notified both counsel that he would advise them when he was ready to decide the motion. It further appears that on August 3, 1945, the following order was entered nunc pro tunc as of June 29, 1945:

"This cause coming on to be heard on motion of Roger T. Bevan and Margaret C. Bevan, two of the defendants herein, to vacate judgment heretofore entered in this cause on May 23, 1945, and the Court having considered said motion of the defendants as aforesaid, and heard arguments of counsel thereon:

"It Is Ordered, Adjudged and Decreed that said defendants as aforesaid, be and they are hereby given leave of Court to file their petition to vacate and set aside said judgment heretofore entered on May 23, 1945, as aforesaid, and said defend-

Court of Chicago, that he became engaged in the trial of one of the cases in the Municipal Court before Judge [illegible] and that he was engaged in said trial on the morning forenoon of that day; that by reason of the fact that he had to [illegible] be matched the necessary of plaintiff's attorney [illegible] call of the instant case before Judge [illegible] and that case was tried on merits, and that he could not be present on May 23, 1949; was entered [illegible]. The record further shows that the following order was entered on August 1, 1949: "Counsel statement, attorney for plaintiff, and counsel for defendants being present in open court, it is ordered that the above entitled cause shall stand for hearing on August 8, 1949, at the opening of court in the forenoon, without further notice." The cause came on for hearing on August 8, 1949, there was a hearing before the trial court and the motion of defendants to vacate the judgment of May 23, 1949, at which time counsel for plaintiff appeared and cross-examined witnesses called by defendants in support of said motion; that at the close of the hearing the court entitled such counsel that he would advise them when he was ready to rule on motion. It further appears that on August 1, 1949, the following order was entered nunc pro tunc as of June 23, 1949:

"This cause coming on to be heard on motion of Roger T. Owen and Raymond T. Owen, two of the defendants herein, to vacate judgment heretofore entered in this cause on May 23, 1949, and the court having considered said motion of the defendants as aforesaid, and heard arguments of counsel thereon:

"It Is Ordered, Adjudged and Decreed that said defendants as aforesaid, be and they are hereby given leave of Court to file their petition to vacate and set aside said judgment heretofore entered on May 23, 1949, as aforesaid, and said defend-

ants are accordingly given leave to appear and defend this cause.

"It Is Further Ordered, Adjudged and Decreed that the judgment order of May 23, 1945, stand as security.

"It Is Further Ordered, Adjudged and Decreed and by agreement of the parties a jury is waived, and the cause submitted to the Court for decision.

"It Is Further Ordered, Adjudged and Decreed that the cause stand for hearing on the merits on August 3, 1945, at the hour of ten o'clock A.M., to which day said cause shall stand adjourned without further notice."

The record further shows that after a hearing before the court the order of September 10, 1945, was entered. The record further shows that plaintiff, on September 20, 1945, filed a motion for a new trial, which was verified by his attorney, in which the only ground alleged in support of the motion was that the judgment of September 10, 1945, was contrary to the weight of the evidence and contrary to the law. By the nature of his motion filed on September 20, 1945, plaintiff conceded, in effect, that the court had jurisdiction to enter the order of September 10, 1945.

It is the settled law that the filing on May 24, 1945, of defendants' motion to vacate the judgment that had been entered on the day before stayed the judgment until that motion was disposed of. (See Lenhart v. Miller, 375 Ill. 346, 351.) The record fails to show that plaintiff, in the trial court, raised any question as to a lack of jurisdiction in the trial court to set aside the judgment order of May 23, 1945. Indeed, it affirmatively appears from the order entered August 3, 1945, nunc pro tunc as of June 29, 1945, that the parties agreed to waive a jury and submit the cause to the court for a decision "on the merits." When the trial court decided the matter adversely to plaintiff he filed a motion for a new trial upon

ants are accordingly given leave to appear and defend this cause.

"It is further ordered, Adjudged and Decreed that the judgment order of May 21, 1947, stand as security.

"It is further ordered, Adjudged and Decreed and by agreement of the parties a jury is waived, and the cause submitted to the Court for decision.

"It is further ordered, Adjudged and Decreed that the cause stand for hearing on the merits on August 1, 1947, at the hour of ten o'clock A.M., to which day said cause shall stand adjourned without further notice."

The record further shows that after a hearing before the court the order of September 10, 1947, was entered. The record further shows that plaintiff, on September 23, 1947, filed a motion for a new trial, which was verified by his attorney, in which the only ground alleged in support of the motion was that the judgment of September 10, 1947, was contrary to the weight of the evidence and contrary to the law. By the nature of his motion filed on September 23, 1947, plaintiff conceded, in effect, that the court had jurisdiction to enter the order of September 10, 1947.

It is the settled law that the filing on May 24, 1947, of defendants' motion to vacate the judgment that had been entered on the day before stayed the judgment until that motion was disposed of. (See Lorbert v. Miller, 377 Ill. 366, 371.) The record fails to show that plaintiff, in the trial court, raised any question as to a lack of jurisdiction in the trial court to set aside the judgment order of May 21, 1947. Indeed, it affirmatively appears from the order entered August 1, 1947, nunc pro tunc as of June 29, 1947, that the parties agreed to waive a jury and submit the cause to the court for a decision "on the merits." When the trial court decided the matter adversely to plaintiff he filed a motion for a new trial upon

the sole ground that the finding of the court was contrary to the weight of the evidence and the law. A party cannot try a cause upon one theory in the trial court and upon a different theory in this court. As stated in Groves v. Illinois Pub. & Printing Co., 327 Ill. App. 544, 546, 547:

"Again, if counsel for defendant wished to question the jurisdiction of the court in setting aside the order of dismissal and reinstating the cause in 1940, as stated by this court in Willis v. Doratis, 263 Ill. App. 97: 'they should either not have appeared at all or limited their appearance to an objection to the jurisdiction of the court. They did not do so but participated in the trial, thus waiving the question of jurisdiction. Zandstra v. Zandstra, 226 Ill. App. 293, and cases there cited.'"

This appeal is so devoid of merit that it has been abandoned, apparently, by plaintiff.

The judgment order of the Circuit court of Cook county of September 10, 1945, and the judgment order of that court of November 1, 1945, are affirmed.

JUDGMENT ORDERS OF SEPTEMBER 10, 1945, AND OF NOVEMBER 1, 1945, AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

the sole ground that the finding of the court was contrary to the weight of the evidence and the law. A newly issued trial a case upon our docket in the Third Court of Appeals of Texas in this court. In United in Jones v. Oil Prod. & Refining Co., 227 Ill. App. 344, 346, 347:

"Again, if counsel for defendant intend to question the jurisdiction of the court in holding with the order of dismissal and relinquishing the cause to Texas, as stated by this court in Gillis v. Pennsylvania, 251 Ill. 70, 72: 'They should either not have appeared at all or limited their appearance to an objection to the jurisdiction of the court. They did not do so but participated in the trial, thus waiving the question of jurisdiction.' Gaskins v. Gaskins, 245 Ill. 4, 7, 8, and cases there cited."

This appeal is an abuse of court that it has been abandoned, apparently, by plaintiff.

The judgment order of the circuit court of Cook County of September 18, 1947, and the judgment order of last term of November 1, 1949, are affirmed.

Judgment orders of circuit
Ill., 1949, Nov. 1, 1949,
Ill., 1947.

Millner, P. J., and Friend, J., concur.

43884

ARNOLD S. KIRKEBY,
Appellee,

v.

AVENUE HOTEL CORPORATION,
Appellant.

330 I.A. 246

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

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MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant upon a contract. A trial without a jury resulted in a finding and judgment for plaintiff in the sum of $42,466.67, and defendant appeals.

The facts out of which this controversy arose are substantially as follows. In August, 1943, S. A. Healy was interested in the purchase of the Stevens Hotel in Chicago, referred to as one of the largest hotels in the United States, then owned by the United States Government and under the control of the U. S. Army. The property was offered for sale, and bids were solicited. S. A. Healy was without any hotel experience and desired an experienced hotel man in the event he succeeded in purchasing this hotel. He was also interested in concealing his own identity with the contemplated bid or purchase from the Government. He consulted his lawyer, Daniel M. Healy, (not related to him) about the matter, who in turn recommended plaintiff as a leading hotel man of national reputation among hotel operators. Plaintiff apparently answered all the needs of Healy, who authorized his attorney to negotiate with plaintiff. Attorney Healy had acted for plaintiff in other legal matters and was also acting for plaintiff in this matter. Plaintiff had no other lawyer during these negotiations.

A corporation to take over the property was contemplated,

HAROLD E. KINNEY,
Appellee,

v.

AVENUE HOTEL CORPORATION,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE WILKINSON delivered the opinion of the court.

Plaintiff sued defendant upon a contract. A trial without a jury resulted in a finding and judgment for plaintiff in the sum of $42,[illegible].97, and defendant appeals.

The facts out of which this controversy arose are substantially as follows. In August, 1945, R. A. Healy was interested in the purchase of the Sherman Park Hotel in Chicago, referred to as one of the largest hotels in the United States, then owned by the United States Government and under the control of the U. S. Army. The property was offered for sale, and bids were solicited. R. A. Healy was without any hotel experience and desired an experienced hotel man in the event he succeeded in purchasing this hotel. He was also interested in concealing his own identity with the contemplated old or purchase from the Government. He so acted his lawyer, Daniel M. Healy, (not related to him) about the matter, who in turn recommended plaintiff as a leading hotel man of national reputation among hotel operators. Plaintiff consequently answered all the needs of Healy, who authorized his attorney to negotiate with plaintiff. Attorney Healy had acted for plaintiff in other legal matters and was also acting for plaintiff in this matter. Plaintiff had no other lawyer during these negotiations.

A corporation to take over the property was contemplated,

with a capitalization of $300,000, 85% of which S. A. Healy was to furnish and plaintiff 15%. Plaintiff was to act as manager of the hotel.

The contract between the parties was prepared by Daniel Healy, and the three met on the morning of September 4, 1943, in plaintiff's office. The bids to the Government were due that afternoon at 2 o'clock. The parties agreed that $5,251,000 was to be the bid for the property, which amount was inserted in the contract referred to. The matter of signing the contract was discussed, and S. A. Healy suggested that he would sign it with the understanding that the contract and duplicate be left with Daniel Healy, not to be delivered until after he (S.A.Healy) had a chance to study it, and if it did not contain satisfactory provisions, that it be marked void. Both parties signed it, and the same was delivered to attorney Healy.

The bid was made and accepted with the down payment required by the Government. A few days after the bid was made, the parties met again, and after objections voiced by S. A. Healy to the contract, it is admitted, the signatures tonthe contract were torn off and the contract abandoned. A new contract was to be drawn by attorney Healy, but it was never done, and the parties continued their dealings without a written contract. The bid to the Government was made in plaintiff's name, and plaintiff furnished his personal check for $125,000, of which amount S. A. Healy contributed 85% and plaintiff 15%.

Pursuant to the terms of the bid and the offer by the Government, possession of the premises was delivered to the plaintiff on September 9, 1943. The defendant corporation was formed in the interim, with an authorized capital stockbof $300,000. It appears without contradiction that between the time of the acceptance of the bid by the Government and the date of the contract sued upon, October 1, 1943, plaintiff had rendered considerable service, pledged his own credit

with a capitalization of $300,000, 85% of which G. A. Healy was to furnish and plaintiff 15%. Plaintiff was to get an accounting of the hotel.

The contract between the parties was prepared by Daniel Healy, and the three met on the morning of September 4, 1944, in plaintiff's office. The bids to the Government were due that afternoon at 2 o'clock. The parties agreed that $1,811,000 was to be the bid for the property, which amount was inserted in the contract referred to. The matter of signing the contract was discussed, and G. A. Healy suggested that he would sign it with the understanding that the contract and documents be left with Daniel Healy, not to be delivered until after he (G.A.Healy) had a chance to study it, and if it did not contain satisfactory provisions, that it be marked void. Both parties signed it, and the case was delivered to attorney Healy.

The bid was made and accepted with the down payment required by the Government. A few days after the bid was made, the parties met again, and after objections raised by G. A. Healy to the contract, it is admitted, the signatures across contract were torn off and the contract destroyed. A new contract was to be drawn by attorney Healy, but it was never done, and the parties continued their dealings without a written contract. The bid to the Government was made in plaintiff's name, and plaintiff furnished his personal check for $15,000, of which amount G. A. Healy contributed $2,000 to plaintiff 15%.

Pursuant to the terms of the bid and the offer by the Government, possession of the premises was delivered to the plaintiff on September 6, 1944. The corporation defendant was formed in the interim, with an authorized capital stock of $300,000. It appears without contradiction that between the time of the acceptance of the bid by the Government and the date of the contract sued upon, October 1, 1944, plaintiff had rendered considerable services, placed his own credit

and advanced his own money toward the completion of plans to open the hotel to the public by November 1, 1943. A deed to the property dated September 22, 1943 was issued in plaintiff's name, the Government refusing to issue the deed to anyone except the bidder.

Disputes between S. A. Healy and plaintiff arose with respect to plaintiff's services. When attorney Healy, during these disputes, advised plaintiff that S. A. Healy was dissatisfied with plaintiff's services, plaintiff hired attorney Bluford to represent him in place of attorney Healy. These disputes became more intense, and many meetings were held between the principals and the two attorneys, which finally ended in the signing of four settlement agreements, each agreement referring to a separate subject matter, but all a part of the one transaction and signed and delivered at the same time. They were all dated October 1, 1943, and were intended to fully settle the disputes between the parties and their respective rights and interests in the defendant company and hotel property. These contracts for convenience will be referred to as the "A", "B", "C", and "D" contracts. "A" contained the recital that plaintiff, in making the bid for the property and acquiring title, did so for defendant, and he agreed therein to convey the title to defendant and otherwise comply with all reasonable and proper requests of its directors in respect thereto. "B" provided for the sale of plaintiff's stock interest in defendant to S. A. Healy Company and the payment to plaintiff of $45,000, the amount which plaintiff originally paid for the stock. "C" recited the services rendered by plaintiff to and on behalf of defendant and provided for the payment of $100,000 by defendant to plaintiff in 5 equal annual installments, the first installment payable October 1, 1944, the total to be in full payment for all such services. "D" was a management contract, in which plaintiff agreed with defendant to be general manager of the hotel for one year without

and advanced his own money toward the completion of plans to open the hotel to the public by November 1, 1944. A deed to the property dated September 12, 1942 was issued in plaintiff's name, the Government refusing to issue the deed to anyone except the bidder.

Disputes between T. A. Healy and plaintiff arose with respect to plaintiff's services. Upon investigation Healy, learning these disputes, advised plaintiff that T. A. Healy was dissatisfied with plaintiff's services, plaintiff hired attorney Hudson to represent him in place of attorney Healy. These disputes became more intense, and many meetings were held between the principals and the two attorneys, which finally ended in the signing of four settlement agreements, each agreement referring to a separate subject matter, but all a part of the transaction and signed and delivered at the same time. They were all dated October 1, 1944, and were intended to fully settle the disputes between the parties and their respective claims and interests in the defendant company and hotel property. These contracts for convenience will be referred to as the "a", "b", "c", and "d" contracts. "a" contained the recital that plaintiff, in making the bid for the property and securing title, did so for defendant, and he agreed thereto to convey the title to defendant and otherwise comply with all reasonable and proper requests of its directors in respect thereto. "b" provided for the sale of plaintiff's stock interest in defendant to T. A. Healy Company and the payment to plaintiff of $45,000, one account which plaintiff originally paid for the stock. "c" recited the services rendered by plaintiff to and on behalf of defendant and provided for the payment of $100,000 by defendant to plaintiff in 5 equal annual installments, the first installment payable October 1, 1944, the total to be in full payment for all such services. "d" was a management contract, in which plaintiff agreed with defendant to be general manager of the hotel for one year without

compensation and to give his best efforts. When these contracts were presented for signature at a meeting of the parties and the two attorneys, it is claimed by defendant, that the statement was then made by S. A. Healy that under all the circumstances, the demand by plaintiff of $100,000 in settlement of plaintiff's interest, and the refusal of plaintiff to convey title to the defendant company until the matter was settled, was tantamount to holding a gun to his head, and he felt compelled therefore to sign the contracts in question; that without the title in the name of defendant, it would interfere with the defendant borrowing the necessary capital from the bank with which to make the final payment to the Government due January 11, 1944. Plaintiff and attorney Bluford deny that such statement was made before the signing of these contracts. On the contrary, they testified that after the contracts were signed plaintiff and S. A. Healy appeared to be on very friendly terms. S. A. Healy invited those present to be his guests for lunch, and the feeling was most cordial betwween the parties during the more than an hour spent at lunch. Both plaintiff and attorney Bluford testified that plaintiff and S. A. Healy shook hands and agreed to bury the hatchet, and both felt they would be able to get along very well together.

These contracts on behalf of defendant were approved by the board of directors of defendant. Plaintiff was elected president and director of defendant company and continued to act in those capacities, as well as manager of the hotel, until about December 10 or 11, 1943, when S. A. Healy notified him that he wanted him to resign as president and director, that he (Healy) would assume these positions, and would have no further use for plaintiff's services. Plaintiff insisted on a written notice of termination of his services, so that it could not thereafter be claimed he breached his contract for services as manager. Both attorneys drafted a contract dated January 10, 1944, terminating contract "D", already referred to. This contract provided in

compensation and to give his best efforts. When these contracts were presented for signature at a meeting of the parties and the two attorneys, it is claimed by defendant, that the statement was then made by R. A. Healy that under all the circumstances, the demand by plaintiff of $100,000 in settlement of plaintiff's interest, and the refusal of plaintiff to convey title to the defendant company until the matter was settled, was tantamount to holding a gun to his head, and he felt compelled therefore to sign the contracts in question; that without the title in the name of defendant, it would interfere with the defendant borrowing the necessary capital from the bank with which to make the final payment to the Government due January 11, 1944. Plaintiff and attorney Binford deny that such statement was made before the signing of these contracts. On the contrary, they testified that after the contracts were signed plaintiff and R. A. Healy appeared to be on very friendly terms. R. A. Healy invited these parties to his quarts for lunch, and the feeling was most cordial between the parties during the more than an hour spent at lunch. Both plaintiff and attorney Binford testified that plaintiff and R. A. Healy shook hands and agreed to keep the secret, and both that they would be able to get along very well together.

These contracts on behalf of defendant were approved by the board of directors of defendant. Plaintiff was elected president and director of defendant company and continued to act in those capacities, as well as manager of the hotel, until about December 10 or 11, 1943, when R. A. Healy notified him that he wanted him to resign as president and director, that he (Healy) would assume these positions, and would have no further use for plaintiff's services. Plaintiff insisted on a written notice of termination of his services, so that it could not thereafter be claimed he breached his contract for a fixed or longer term. Both attorneys drafted a contract dated January 10, 1944, terminating contract "A", already referred to. This contract provided in

Article 3, inter alia, that the hotel company thereby approved, ratified and confirmed all acts and deeds of every kind and character done and performed by Kirkeby in any and every capacity in connection with or for and on behalf of the Stevens Hotel or the hotel company, which had been rightfully done or which had been reported to or done with the knowledge of anyone of several people, (naming them) S. A. Healy among them; the hotel company agreed to indemnify Kirkeby and save him harmless of, from and against any and all liabilities or claims that may be asserted against him by reason of any of the acts or deeds so done or performed by him. In this agreement, plaintiff resigned as general manager, as director and as president, effective as of the date of the agreement, and in Article 6 it was provided that the "A", "B" and "C" agreements, and each of them, in all respects remained in full force and effect and were not in any wise annulled, cancelled, terminated, modified, amended or otherwise affected in any respect by this agreement or by anything that might be done under or pursuant thereto.

At the time of the signing of the contract, January 10, 1944, a check for $4,951,000, the balance of the purchase price, was turned over to the Government. The amount represented by this check was obtained by a loan from one of the banks on the note of the S. A. Healy Company, a company owned and controlled by S. A. Healy. Plaintiff at the same time delivered a quitclaim deed for the hotel property, signed by himself and wife, to defendant. It was after this deed was delivered that defendant executed a mortgage on the hotel property in favor of the bank to secure the loan. S. A. Healy testified that from the time of the bid down to the date of the loan by the bank, he and his company had enough money and credit to close the deal with the Government. It is undisputed that between October 1, 1943, when the "A", "B", "C" and "D" contracts were signed, and October 1, 1944, when the first installment under the "C" contract fell due,

Article 3, inter alia, that the hotel company thereby approved, ratified and confirmed all acts and deeds of every kind and character done and performed by Kirkeby in any and every capacity in connection with or for and on behalf of the Stevens Hotel or the hotel company, which had been rightfully done or which had been reported to or done with the knowledge of anyone of several people, (naming them) S. A. Healy among them; the hotel company agreed to indemnify Kirkeby and save him harmless of, from and against any and all liabilities or claims that may be asserted against him by reason of any of the acts or deeds so done or performed by him. In this agreement, plaintiff resigned as general manager, as director and as president, effective as of the date of the agreement, and in Article 6 it was provided that the "A", "B" and "C" agreements, and each of them, in all respects remained in full force and effect and were not in any wise annulled, cancelled, terminated, modified, amended or otherwise affected in any respect by this agreement or by anything that might be done under or pursuant thereto.

At the time of the signing of the contract, January 10, 1944, a check for $4,921,000, the balance of the purchase price, was turned over to the Government. The amount represented by this check was obtained by a loan from one of the banks on the note of the S. A. Healy Company, a company owned and controlled by S. A. Healy. Plaintiff at the same time delivered a quitclaim deed for the hotel property, signed by himself and wife, to defendant. It was after this deed was delivered that defendant executed a mortgage on the hotel property in favor of the bank to secure the loan. S. A. Healy testified that from the time of the bid down to the date of the loan by the bank, he and his company had enough money and credit to close the deal with the Government. It is undisputed that between October 1, 1943, when the "A", "B", "C" and "D" contracts were signed, and October 1, 1944, when the first installment under the "C" contract fell due,

neither defendant nor anyone on its behalf gave any notice to plaintiff of rescission of the contract sued upon, nor did any act to evidence its intention to rescind the contract. On October 5, 1944, plaintiff received a letter from defendant to the effect that the contract of October 1, 1943, ("C"), was obtained by plaintiff by duress or business compulsion, was without consideration, and all liablity thereunder was disclaimed. It appears that in January, 1945, defendant sold the hotel for $7,500,000. The total investment, including the mortgage to the bank, was $7,000,000.

Defendant seeks to avoid liability under the contract because of claimed duress or business compulsion. In our opinion the facts relied upon do not constitute duress or business compulsion. Plaintiff never pretended that he bid for this property or acquired the deed for himself, but throughout the transaction admitted holding title for defendant. It will be remembered that S. A. Healy did not require the title to the property in order to arrange for the financing of the final payment to the Government. The fact is that S. A. Healy procured the necessary funds to pay the balance of the purchase price by a loan from the bank without the title. The transaction with the Government was completed before plaintiff conveyed title by quitclaim deed to defendant. There was no danger apparent to anyone of defendant losing title to the property. The recital in contract "A", that plaintiff, in making the bid for the property and acquiring title, did so for defendant, was in keeping with every statement, declaration and act on the part of plaintiff throughout the whole transaction. After plaintiff acquired the deed from the Government, certainly if he refused to convey title to the property until contracts "A", "B", "C" and "D" were executed, a court of equity was open to defendant to compel

Neither defendant nor anyone on its behalf gave any notice to plaintiff of rescission of the contract sued upon, nor did any act to evidence its intention to rescind the contract. On October 8, 1944, plaintiff received a letter from defendant to the effect that the contract of October 1, 1943, ("D"), was obtained by plaintiff by duress or business compulsion, was without consideration, and will likewise therefore be disclaimed. It appears that in January, 1945, defendant sold the hotel for $7,500,000. The total investment, including the mortgage to the bank, was $7,000,000.

Defendant seeks to avoid liability under the contract because of claimed duress or business compulsion. In our opinion the facts relied upon do not constitute duress or business compulsion. Plaintiff never pretended that he bid for this property or acquired the deed for himself, but throughout the transaction exhibited holding title for defendant. It will be remembered that E. A. Healy did not require the title to the property in order to arrange for the financing of the final payment to the Government. The fact is that E. A. Healy arranged the necessary funds to pay the balance of the purchase price by a loan from the bank without the title. The transaction with the Government was completed before plaintiff acquired title by quitclaim deed to defendant. There was no danger demanded to secure of defendant loaning title to the property. The recital in contract "A", that plaintiff, in making the bid for the property and obtaining title, did so for defendant, was in keeping with every statement, declaration and act on the part of plaintiff throughout the whole transaction. After plaintiff acquired the deed from the Government, certainly if he refused to convey title to the property until contracts "A", "B", "C" and "D" were executed, a court of equity was open to defendant to compel

plaintiff to make the conveyance. Under such circumstances, there was no duress of property or business compulsion at the time of the signing of the agreement sued upon.

The case chiefly relied upon by defendant, Illinois Merchants Trust Co. v. Harvey, 335 Ill. 284, is against defendant's position rather than sustaining it. In that case the claim was, that payment was made because of a threatened forfeiture of a valuable lease, constituted duress or business compulsion, and lessee sought to recover back the money paid. It was there said (p. 292, 296):

> "If he may avoid the payment of such demand by resorting to a remedy in equity but does not availmhimself of such remedy the payment is not compulsory even though pressure for payment is re-enforced by a threat to commit injury. * * * We are of the opinion that the forfeiture threatened against defendants in error was cognizable in equity, and that, the demand being invalid and the result of a forfeiture being of serious consequence to defendants in error, equity would have relieved against the same. Defendants in error had sixty days in which to apply for such relief. There was adequate time to secure the aid of equity and that court was open to them. It follows that the payment by them was voluntary and not made under compulsion or duress."

In the instant case, instead of payment being involved, it is the contract sued upon they claim was obtained by duress or compulsion. The principle above stated applies in either case. The duress or compulsion complained of occurred, if at all, before October 1, 1943, the date of the contract. When defendant entered into the contract of January 10, 1944, in which it is specifically recited that all of the contracts, "A", "B", "C", were ratified and confirmed by defendant, and ratified and confirmed all of the acts performed by plaintiff in every capacity on behalf of defendant, and specifically indemnified him against any claim by reason of anything he had done on behalf of defendant, it was such a ratification of all that preceded it as to preclude the defendant from now raising the

plaintiff to make the conveyance. Under such circumstances, there was no duress of property or business compulsion at the time of the signing of the agreement and note.

The case chiefly relied upon by defendant, Illinois Terminals First Co. v. Carter, 302 Ill. 294, is against defendant's position rather than evaidencing it. In that case the claim was, that repayment was made because of a threatened forfeiture of a valuable lease, constituting duress or business compulsion, and lessee sought to recover back the money paid. It was there said (p. 299, 300):

> "If he may avoid the payment of such demand by resorting to a remedy in equity, but does not avail himself of such remedy the payment is not compulsory even though pressure for payment is re-enforced by a threat to commit injury. * * * In one of the opinions that the forfeiture threatened against defendants in error was collectible in equity, and that, the demand being invalid and the result of a forfeiture being of serious consequence to defendants in error, equity would have relieved against the same. Defendants in error had clearly law in their to rely for such relief. There was adequate time to resort to the aid of equity and that court was open to them. It follows that the payment by them was voluntary and not made under compulsion or duress."

In the instant case, instead of payment being involved, it is the contract sued upon that allegedly was obtained by duress or compulsion. The principle above stated applies in this case. The duress or compulsion complained of occurred, if at all, before October 1, 1927, the date of the contract. When defendant entered into the contract of January 10, 1928, in which it is specifically recited that all of the contracts, "A", "B", "C", were realized and confirmed by defendant, and realized and confirmed all of the acts performed by plaintiff in every capacity on behalf of defendant, and specifically ratified his contract and claim by reason of anything he had done on behalf of defendant, it was such a ratification of all that preceded it as to preclude the defendant from now relying the

defense of duress or compulsion.

In Prontzinski v. Baker, 364 Ill. 451, a bill was filed to set aside a deed and bill of sale because of duress and compulsion. It was there claimed that the contract for the sale of the property was procured by threat of putting the vendors in jail. Subsequent to the date of the contract and the alleged threat and duress, an abstract of title was furnished to the lawyer for the vendee and the deed passed and the purchase money paid. It was there said (p. 455):

> "Even assuming that appellants, because of threats, were induced to sign the contracts on June 11 and 14, it is clear from their testimony that they not only were not influenced by coercion or duress on July 2, when they made the deed and bill of sale and accepted the purchase price, but that they did so after seeking and accepting advice from their own attorney. This, even granting they had made a case of coercion as to the signing of contracts, constitutes a ratification of their former acts."

It will be remembered also, that following the signing of the contract sued upon, plaintiff continued to render his services to defendant until January 10, 1944, as manager, director and president of defendant company, on which latter date he resigned. This, too, must constitute a ratification of the alleged duress and compulsion existing on October 1, 1943.

The first payment under the contract sued upon was due October 1, 1944. On October 5, following, defendant delivered a letter to plaintiff for the first time in any way indicating a desire to rescind the contract sued upon and giving notice of its intention to disclaim liability thereunder, "because the contract was obtained by duress or business compulsion and without consideration." This was clearly a notice of the rescission of the contract given a year after the contract sued upon was signed. This was an inexcusable delay in rescinding the contract in question. One should rescind at the earliest

defense of duress or compulsion.

In Prentiss v. Baker, 304 Ill. 421, a bill was filed to set aside a deed and bill of sale because of duress and compulsion. It was there claimed that the contract for the sale of the property was procured by threat of putting the vendors in jail. Subsequent to the date of the contract and the alleged threat and duress, an abstract of title was furnished to the lawyer for the vendee and the deed passed and the purchase money paid. It was there said (p. 424):

> "Even assuming that appellants, because of threats, were induced to sign the contracts on June 11 and 14, it is clear from their testimony that they not only were not influenced by coercion or duress on July 2, when they made the deed and bill of sale and accepted the purchase price, but that they did so after seeking and accepting advice from their own attorney. This, even granting they had made a case of coercion as to the signing of contracts, constitutes a ratification of their former acts."

It will be remembered also, that following the signing of the contract sued upon, plaintiff continued to render his services to defendant until 1 January 10, 1944, as counsel, director and president of defendant company, on which latter date he resigned. This, too, must constitute a ratification of the alleged duress and compulsion existing on October 1, 1943.

The first payment under the contract sued upon was due October 1, 1944. On October 6, following, defendant delivered a letter to plaintiff for the first time in any way indicating a desire to rescind the contract sued upon and giving notice of its intention to disclaim liability thereunder, "because the contract was obtained by duress or business compulsion and without consideration." This was clearly a notice of the rescission of the contract given a year after the contract sued upon was signed. This was an inexcusable delay in repudiating the contract in question. One should rescind if the party

time possible after he is cognizant of the facts which entitle him to rescind.

In Richter v. Schuett, 314 Ill. 127, the court quoted with approval a statement in Pomeroy's Equity Jurisprudence, §897:

> "The person who has been misled is required, as soon as he learns the truth, with all reasonable diligence to disaffirm the contract or abandon the transaction and give the other party an opportunity of rescinding it and of restoring both of them to their original position. He is not allowed to go on and derive all possible benefits from the transaction and then claim to be relieved from his own obligation by a rescission for a refusal to perform on his own part."

Counsel for defendant in their brief, in their effort to distinguish Richter v. Schuett, say: "In the case at bar there was nothing to give back to plaintiff. He had been repaid his whole investment." As already pointed out, contracts "A", "B", "C" and "D" were signed and executed at the same time and all dated October 1, 1943. The consideration for each of the contracts, in addition to the specified consideration, was the signing of each of them. It was one and the same transaction and could have well been included in one agreement. The parties chose to make four agreements of it. It is clear that neither one of the four agreements would have been signed unless they had all been signed. Each was an integral part of the consideration of the other. If there was to be any rescission it would necessarily have to be of all four contracts. In view of that, it can hardly be said there was nothing to return under the equitable requirement for rescinding a contract. The services rendered by plaintiff to defendant, no one claims were paid for. They accepted his services and retained them. They accepted his

time possible after he is cognizant of the facts which entitle him to rescind.

In Rickter v. Bennett, 214 Ill. 127, the court quoted with approval a statement in Pomeroy's Equity Jurisprudence, §897:

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Counsel for defendant in their brief, in their effort to distinguish Richter v. Bennett, say: "In the case at bar there was nothing to give back to plaintiff. He had been repaid his whole investment." As already pointed out, contracts "A", "B", "C" and "D" were signed and executed at the same time and all dated October 1, 1944. The consideration for each of the contracts, in addition to the specified consideration, was the signing of each of them. It was one and the same transaction and could have well been included in one agreement. The parties chose to make four agreements of it. It is clear that neither one of the four agreements would have been signed unless they had all been signed. Each was an integral part of the consideration of the other. If there was to be any rescission it would necessarily have to be of all four contracts. In view of that, it can hardly be said there was nothing to return under the equitable requirement for rescinding a contract. The services rendered by plaintiff to defendant, no one claims were paid for. They accepted his services and retained them. They accepted his

credit, which he pledged. They ratified all of this by the contract of January 10, 1944.

The right to rescind, if it exist, carries with it an obligation to tender back whatever was obtained under the contracts, and place the parties in status quo. Within 60 days after the notice of rescission, the property was soldn at a profit of upwards of $500,000. It established a greater value for the stock which plaintiff originally held in defendant company. If they had tendered back his stock to him, he would have been able to get the benefit of the enhanced value of his stock.

As was said in Jackson v. Anderson, 355 Ill. 550 at p. 555:

> "It is an elementary and long established rule that if a party accepts the provisions of a contract which are of advantage to him he will be bound by the provisions which purport to be obligatory on him, and that if there is any right of resdission of that contract it must be exercised as to all of it. The contract must stand or fall as a whole, and no one may retain the consideration, or a part of it, and refuse to be bound by the contract or a part of it."

The defendant has failed to sustain the claim of duress or compulsion. The judgment of the Circuit Court is fully supported by the facts and is accordingly affirmed.

AFFIRMED.

O'Connor, P. J., and Niemeyer, J., concur.

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The right to rescind, if it exist, carries with it an obligation to tender back whatever was obtained under the contracts, and place the parties in status quo. Within 60 days after the notice of rescission, the property was sold at a profit of upwards of $100,000. It established a greater value for the stock which plaintiff originally paid in defendant company. If they had tendered back his stock to him, he would have been able to get the benefit of the enhanced value of his stock.

As was said in Jackson v. Anderson, 270 Ill. 620 at p. 635:

> "It is an elementary and long established rule that if a party accepts the provisions of a contract which are of advantage to him he will be bound by the provisions which appear to be obligatory on him, and that if there is any right of rescission of that contract it must be exercised as to all of it. The contract must stand or fall as a whole, and no one may retain the consideration, or a part of it, and refuse to be bound by the contract or a part of it."

The defendant has failed to sustain the claim of duress or compulsion. The judgment of the Circuit Court is fully supported by the facts and is accordingly affirmed.

AFFIRMED.

Gidearner, P. J., and Kiesmeyer, J., concur.

43902

JAMES A. EVAR, Appellant,	)	
v.	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
DONNA S. EVAR, Appellee.	)	

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from the order of the Circuit Court, modifying a decree for divorce entered on November 29, 1935, in favor of the wife, cross-plaintiff in the suit.

On June 13, 1944, plaintiff, the husband, filed a petition under the statute to modify the decree, which originally fixed the alimony and support of the wife, cross-plaintiff, and of two minor children at $100 per month, alleging that a change in circumstances had occurred, in that the wife was employed by the government in the post office department and was earning a weekly wage of $42; that one of the minor children had reached her majority, and the other minor child was not living at home but in the Mary Bartelme Club; that since the decree plaintiff had remarried and has three children by his second marriage, one 7 years of age, another 4 years and the third 19 months; that he has a mother 74 years of age, totally dependent upon him for support.

Defendant filed an answer to that petition, admitting that she was employed; that one of the minor children had reached her majority; that plaintiff pays to the Mary Bartelme Club for the accommodation of the minor child the sum of $25 per month and pays for the support of the other daughter the sum of $25 per month; but denying that the circumstances have changed tonsuch an extent that the plaintiff was entitled to the relief sought.

CASE

JAMES A. STAR,
Appellant,

v.

OSCAR C. STAR,
Appellee.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY.

MR. JUSTICE FRANCIS SCHWILLER-TO-CONSIDER-DECISION-HERE-CONSIDERED.

Plaintiff appeals from the order of the circuit court, modifying a decree for divorce entered on November 14, 1938, in favor of the wife, upon-plaintiff's petition.

On June 16, 1933, plaintiff, who married, filed a petition under the statute to modify the decree, which originally fixed his alimony and support of his wife, divorcee - plaintiff, and of two minor children at $[illegible] per week, alleging that a change in circumstances had occurred, in that he was employed by the government in the post office department and was earning a weekly wage of $[illegible]; that one of his minor children had reached her majority, and the other [illegible] was not living at home but in the city [illegible]; that since the decree plaintiff had remarried and has three children by his second marriage, one 7 years of age, another 4 years and the third 12 months; that he has a wife [illegible] totally dependent upon him for support.

Defendant filed an answer to the petition, admitting that she was employed; that one of the minor children had reached her majority; that plaintiff owns a [illegible] club for the accommodation of the minor child [illegible] per month and pays for the support of the other dependent the sum of $[illegible] per month; but denying that the circumstances were changed to such an extent that the plaintiff was entitled to the relief sought.

Upon the hearing of the petition and answer, the court entered an order suspending further payments for the support of defendant until the further order of the court; suspending all further support for the daughter, Clara, who had attained her majority; directing him to pay $25 a month for the support of the minor child until she reaches her majority or until the further order of the court; requiring him to pay the solicitor's fees and special commissioner's fees, and in all other respects confirming the original decree of November 29, 1935.

On May 23, 1946, cross-plaintiff filed a petition, praying for an order for allowance of alimony; alleging that since the order of September 15, 1944, she lost her position with the post office department, is without funds, in need of support and maintenance and in need of dental attention; that because of the change in circumstances, she be given an allowance for her support and maintenance.

Plaintiff filed an answer to this petition, alleging that no change of circumstances occurred since the order of September 15, 1944, and that defendant is an able-bodied person and can obtain gainful employment for her support and maintenance.

A hearing was had upon the petition and answer, and evidence was introduced by both sides. It appears from the evidence that plaintiff earns $5200 a year.

Where a decree of divorce is entered in favor of the wife, the husband may be compelled to pay for her separate maintenance according to the standard and custom to which he accustomed her before their separation, if within his financial ability. As early as Stillman v. Stillman, 99 Ill. 196 at p.201, and as late as Herrick v. Herrick, 319 Ill. 146, this has been the rule. If, after decree, the circumstances of the parties have changed, the court may alter the provisions for alimony. Herrick v. Herrick, There is no authority cited by

Upon the hearing of the petition and answer, the court entered an order suspending further proceedings for the support of defendant until the further order of the court; suspending all further support for the children, Clara, who had attained her majority; directing the payment of a sum for the support of the minor child until she reaches her majority or until the further order of the court; requiring payment of the solicitor's fees and special commissioner's fees, and in all other respects confirming the original decree of November 29, 1926.

On May 24, 1929, cross-plaintiff filed a petition, praying for an order for alimony, alleging that since the order of September 12, 1924, she lost her position at the post office department, is without funds, in need of support and maintenance and in need of medical attention; that because of the change in circumstances, she be given an allowance for her support and maintenance.

Plaintiff filed an answer to this petition, alleging that no change of circumstances occurred since the order of September 12, 1924, and that defendant is an able-bodied person and can obtain suitable employment for her support and maintenance.

A hearing was had upon the pleadings and answer, and evidence was introduced on both sides. Thereupon the court found that alimony ought to be paid.

Where a decree of divorce is entered in favor of the wife, the husband may be compelled by her for her immediate maintenance according to the statutory and custom in such cases before their separation, to which his financial ability. As early as Hillman v. Hillman, 40 Ill. 124 at p.131, and as late as Dorsey v. Dorsey, 328 Ill. 349, this has been the rule. It, after decree, the circumstances of the parties have changed, the court may alter the provisions for alimony. Durfee v. Durfee. There is no authority cited or

plaintiff, which holds that she is obliged to seek employment, if able to work, to relieve him of the obligation of support when he has the ability to support her. Even assistance she obtains from other sources does not relieve him of this obligation. Shaffner v. Shaffner, 212 Ill. 492 at p.497.

When the order of September 15, 1944, suspending payments to the defendant for her support and maintenance, was entered, a proper showing was then made of a change in circumstances, which warranted the modification of the decree. When the order appealed from was entered, again a change in circumstances was proven, which again justified modifying the decree.

The court heard the evidence and found that the change in circumstances justified the order for the allowance of $80 a month to her for her support and maintenance. We cannot say that the finding of the chancellor was against the manifest weight of the evidence. The order of the Circuit Court is affirmed.

AFFIRMED.

O'Connor, P. J., and Niemeyer, J., concur.

plaintiff, which holds that she is obliged to seek employment, if able to work, to relieve him of the obligation of support when he has the ability to support her. Even had she been obtaining from other sources does not relieve him of this obligation. Shelfer v. Shelfer, 72 Ill. App. at p.472.

Upon the order of September 17, 1943, concerning matters to the defendant for her support and maintenance, was entered, a proper showing was made of a change in circumstances, which warranted the modification of the decree. Upon the order appealed from was entered, again a change in circumstances was proven, which again justified modifying the decree.

The court held the evidence and found that the change in circumstances justified the order for the allowance of $ 20.00 to her for her support and maintenance. We cannot say that the finding of the chancellor was against the manifest weight of the evidence. The order of the circuit court is affirmed.

AFFIRMED.

O'Connor, P. J., and Kiley, J., concur.

43830

A 61

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY,
Respondent-Appellee,

v.

ELLA H. TINKOFF and PAYSOFF TINKOFF,
Petitioners-Appellants.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

330 I.A. 247

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendants appeal from an order denying their motion to vacate a decree rendered against them, and also from a subsequent order denying their motion to vacate the prior order.

By their petition filed February 4, 1937, defendants sought to vacate a decree entered February 4, 1936, in a foreclosure proceeding, alleging among other reasons want of proper service on the defendants. This motion lay dormant until October, 1945, when a motion was made to have it set for hearing. On November 27, 1945 an order was entered denying the motion to vacate. This order recited that the court had before it evidence in the form of certified copies of various court files and orders, including a petition by the defendants filed September 5, 1936 to vacate and set aside the decree of February 4, 1936, on various grounds therein set forth, and an order entered January 26, 1937 denying the petitions of defendants to vacate the decree of February 4, 1936 and to quash service of summons in said cause. On November 28, 1945 on petition of defendants an order was entered granting a change of venue from all the judges of the Superior court of Cook county except Judge McGoorty. On the same date defendants filed a petition to vacate the order of the preceding day denying their motion to vacate the decree. The order of

42930

CONTINENTAL ILLINOIS NATIONAL BANK
AND TRUST COMPANY,
Respondent-Appellee,

v.

ELLA B. HIRCEY and RALPH HIRCEY,
Petitioners-Appellants.

APPEAL FROM
MUNICIPAL COURT
COOK COUNTY.

JUDGE PRESIDING.

MR. JUSTICE MCGLOON DELIVERED THE OPINION OF THE COURT:

Petitioners appeal from an order denying their motion to vacate a default judgment entered June, and also from a subsequent order denying their motion to vacate the prior order.

By their petition filed February 4, 1967, defendants sought to vacate a default judgment February 4, 1966, in a foreclosure proceeding, alleging lack of jurisdiction and improper service on the defendants. This motion was denied until October, 1967, when a motion was made to have it set for hearing. On November 7, 1967 the order was quashed and the motion to vacate. The order provided that the court had before it evidence in the form of certified copies of various court files and orders, including a petition by the defendants filed September 8, 1966 to vacate and set aside the decree of February 4, 1966, on various grounds, through out, and in order entered January 26, 1967 denying the petition of defendants to vacate the decree of February 4, 1966 and to quash service of summons in said cause. On November 16, 1966 a petition of defendants to order an order entered finding a change of venue from all the judges of the Superior court of Cook county except Judge Sodaro. On the same date defendants filed a petition to vacate the order of the presiding day denying their motion to vacate the decree. The owner of

November 27, 1945 denying the motion to vacate was amended by correcting certain dates in the order. On January 31, 1946 Judge McGoorty denied the motion of the defendants to vacate and set aside the order of November 27, 1945, reciting in the order then entered that the court had before it evidence in the form of certified copies of the identical papers specified in the order of November 27, 1945. No report of the proceedings before the court on the entry of the two orders appealed from is before us, and we know nothing of the contents of the papers received in evidence except what is stated in the orders.

In the absence of a report showing to the contrary, we must presume that the action of the trial court was proper. The plaintiffs suggest numerous grounds upon which the action of the trial judges might have been based, among which is the claim that the order entered January 26, 1937 denying defendants prior petition of September 5, 1936 to vacate the original decree of February 4, 1936, is res judicata of any grounds to vacate the decree then existing. They cite in support of this claim, among other cases, Chamblin v. Chamblin, 362 Ill. 588, 592, and State Bank v. Reardon, 301 Ill. App.248, 251.

On the record before us we must assume that the orders complained of were properly entered, and they are affirmed.

ORDERS AFFIRMED.

O'Connor, P. J., and Feinberg, J., concur.

November 27, 1940 caused the motion to vacate was granted by correcting certain dates in the order. On January 21, 1940 Judge Mahoney denied the motion of the defendants to vacate and set aside the order of November 27, 1940, resulting in the order from which the court has before it appeals in the form of certified copies of the identical record qualified in the order of November 27, 1940. On behalf of the appellants before the court on the order of the two orders appealed from is before us, and we have noticed of the contents of the papers received in evidence upon which is stated in the opinion.

In the absence of a proper showing in the contrary, we must presume that the motion of the trial court was grounded the plaintiffs against counsel's granted upon which the motions of the trial judges which have been heard, among which is the claim that the order entered January 28, 1927 having antedated prior petition of September 6, 1927 is void in the record before of February 4, 1928, in the judgments of our opinion in vacate the decree from conflict. (See also in support of this claim, among other cases, Chandler v. Chandler, 66 Ill. 158, 162, and Ryan v. Ryan, 221 Ill. App. 1, 4).

In the second factor we do not find that the petition complained of with properly taken, and that our affirmed.

Order affirmed.

O'Connor, P. J., and Friedman, J., concur.

43409

ANTOINETTE SAVAIANO, Appellee, v. THE 12TH STREET STORE, a corporation, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to reverse a judgment against it for $1,100 entered on the verdict of a jury in an action to recover damages for personal injuries. Plaintiff charged defendant with negligence in permitting a stairway in its store "to become wet and covered with a slippery substance" causing plaintiff to fall.

Defendant's motions for a directed verdict at the close of the evidence, for judgment notwithstanding the verdict, and, in the alternative, for a new trial, were denied.

The record discloses the following facts. On January 16, 1943 the plaintiff, accompanied by a neighbor, one Mrs. Miserendino, walked from her home, a distance of three or four blocks, to defendant's department store which is located at the northeast corner of Halsted and 12th Streets in the City of Chicago, for the purpose of buying shoes. There was snow and slush on the sidewalks and plaintiff wore galoshes. Entering the store from the Halsted Street side they proceeded east to a stairway leading to the second floor. They ascended and spent ten or fifteen minutes in the shoe department on the second floor. They began to descend the same stairs, plaintiff slipped and fell, causing the injuries complained of. The stairway upon which plaintiff fell was about seven feet in width and led from the

42409

ANTHONY SAVALIKO, Appellee, v. THE LUCK STORES, a corporation, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUSTICE LUCAS DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to reverse a judgment against it for $1,100 entered on the verdict of a jury in an action to recover damages for personal injuries. Plaintiff charged defendant with negligence in maintaining a stairway in its store "in a condition not covered with a slippery substance" causing plaintiff to fall.

Defendant's motions for a directed verdict at the close of the evidence, for judgment notwithstanding the verdict, and, in the alternative, for a new trial, were denied.

The record discloses the following facts. On January 16, 1942 the plaintiff, accompanied by a neighbor, one Eva Wisserendino, walked from her home, a distance of three or four blocks, to defendant's department store which is located at the northwest corner of Halsted and 12th streets in the city of Chicago, for the purpose of buying shoes. There was snow and slush on the sidewalks and plaintiff wore galoshes. Entering the store from the Halsted street side they proceeded east to a stairway leading to the second floor. They ascended and spent ten or fifteen minutes in the shoe department on the second floor. They began to descend the same stairs, plaintiff slipped and fell, causing the injuries complained of. The stairway upon which plaintiff fell was about seven feet in width and led from the

first floor to a mezzanine floor; on each side of it were wooden rails and in the center was a handrail made of brass tubing about 2½ inches in diameter, supported by posts. The marble treads of the stairway had been in use for about fifteen years and were slightly worn. On the day of the occurrence the stairway was covered with slush which had been tracked in by defendant's patrons.

When plaintiff and Mrs. Miserendino reached the mezzainine floor as they were descending, they proceeded to walk down the south side of the stairway to the first floor. Plaintiff was "a step or so behind" Mrs. Miserendino. After plaintiff walked down three or four steps from the mezzanine floor she slipped and fell with her right foot pinned underneath her. According to plaintiff's testimony she remained in this position for about half an hour. On the tread of the stairway where plaintiff was lying she noticed water and vomitus, some of which stuck to her coat. Afterwards employees of defendant carried her to a restroom on the third floor where first aid was rendered by Dr. Robin who had been summoned by defendant. Later she was taken to Dr. Robin's office where he took an x-ray of the injured limb. Plaintiff was confined to her home about three months. In July, 1944, Dr. Pease took an x-ray of plaintiff's right ankle. Examination of this x-ray disclosed that the longer end of the tibia was fractured and displaced inward about 1/8 of an inch.

The evidence further shows that plaintiff had used the stairway in question on many occasions covering a period of from "twenty or forty years." The accident happened at about 11:00 o'clock a.m. on a Saturday morning while the store was crowded. Plaintiff used the stairway because the elevators were congested. As she and Mrs. Miserendino walked up the stairs, Mrs. Miserendino observed the vomitus but "forgot to tell" plaintiff of its presence.

first floor to a marmaine floor; on each side of it were wooden rails and in the center was a handrail made of brass tubing about 2½ inches in diameter, supported by posts. The marble treads of the stairway had been in use for about fifteen years and were slightly worn. On the day of the occurrence the stairway was covered with slush which had been tracked in by defendant's patrons.

When plaintiff and Mrs. Hisgrendino reached the marmaine floor as they were descending, they proceeded to walk down the south side of the stairway to the first floor. Plaintiff was "a step or so behind" Mrs. Hisgrendino. After plaintiff walked down three or four steps from the marmaine floor she slipped and fell with her right foot pinned underneath her. According to plaintiff's testimony she remained in this position for about half an hour. On the tread of the stairway where plaintiff was lying she noticed water and vomitus, some of which stuck to her coat. Afterwards employees of defendant carried her to a treatroom on the third floor where first aid was rendered by Dr. Robin who had been summoned by defendant. Later she was taken to Dr. Robin's office where he took an x-ray of the injured limb. Plaintiff was confined to her home about three months. In July, 1944, Dr. Pease took an x-ray of plaintiff's right ankle. Examination of this x-ray disclosed that the lower end of the fibula was fractured and displaced inward about 1/3 of an inch.

The evidence further shows that plaintiff had used the stairway in question on many occasions covering a period of from "twenty or forty years." The accident happened at about 11:00 o'clock a.m. on a Saturday morning while the store was crowded. Plaintiff used the stairway because the elevators were congested. As she and Mrs. Hisgrendino walked up the stairs, Mrs. Hisgrendino observed the vomitus but "forgot to tell" plaintiff of its presence.

Coming down the stairway, Mrs. Miserendino saw the vomitus again but walked around it and just as she was about to caution plaintiff of its presence plaintiff slipped and fell. It appears that immediately before the accident, while plaintiff was walking down the stairs behind Mrs. Miserendino, other persons were walking in both directions upon the stairway in question.

Betty Serchia, called by the defendant, testified that she and her husband, who were employees of defendant at the time of the occurrence, were having lunch in a restaurant located immediately north of the stairway, on the mezzanine floor; that she saw plaintiff fall "about the fifth stair going down"; "we picked her up right away; there were people going up and down; there was no vomitus or anything of that character on her (plaintiff's) coat; her coat was dusty."

Jack Schwartz, also an employee, called by the defendant, testified that he saw plaintiff fall, from a distance of about 100 feet; that he "lifted her up on a chair to take her up to the sick room"; that "it was five or ten minutes from the time she fell until she was lifted off the stairs"; that he did not see any vomitus, and that plaintiff's coat "was dry at the time he picked her up." On cross-examination this witness stated that "Saturday is a heavy day in The 12th Street Store. I would not say it was crowded; the stairway had snow that was carried in from the street, not very much, just a little amount."

Defendant maintains that plaintiff failed to prove that she was in the exercise of ordinary care or that defendant was guilty of negligence which was the proximate cause of her injuries. It is not controverted that plaintiff was an invitee at defendant's store. It owed her the duty to use ordinary care to keep the premises in a reasonably safe condition for her use as a customer.

Coming down the stairway, Mrs. Wisenendlon saw the vomitus again but walked around it and just as she was about to mention plaintiff of its presence plaintiff slipped and fell. It appears that immediately before the accident, while plaintiff was walking down the stairs behind Mrs. Wisenendlon, other persons were walking in both directions upon the stairway in question.

Betty Sarokin, called by the defendant, testified that she and her husband, who were employees of defendant at the time of the occurrence, were having lunch in a restaurant located immediately north of the stairway, on the mezzanine floor; that she saw plaintiff fall "about the fifth stair going down"; "he picked her up right away; there were people going up and down; there was no vomitus or anything of that character on her (plaintiff's) coat; her coat was dusty."

Jack Somerts, also an employee, called by the defendant, testified that he saw plaintiff fall, from a distance of about 100 feet; that he "lifted her up on a chair to take her up to the rest room"; that "it was five or ten minutes from the time she fell until she was lifted off the stairs"; that he did not see any vomitus, and that plaintiff's coat "was dry at the time he picked her up." On cross-examination this witness stated that "Saturday is a busy day in the fifth street store. I would not say it was crowded; the stairway had some that was carried in from the street, not too much, just a little amount."

Defendant maintains that plaintiff failed to prove that she was in the exercise of ordinary care or that defendant was guilty of negligence which was the proximate cause of her injuries. It is not controverted that plaintiff was an invitee at defendant's store. It owed her the duty to use ordinary care to keep the premises in a reasonably safe condition for her use as a customer.

Whether she exercised ordinary care for her own safety, and whether defendant was guilty of negligence were facts for the jury to determine. (Dowling v. MacLean Drug Co., 248 Ill. App. 270.)

In their brief, counsel for defendant say that what caused plaintiff to slip or fall does not appear from the evidence and that it is most likely that her fall was due to a misstep. There is no evidence tending to prove that plaintiff made a misstep. Mrs. Miserendino testified to the presence of vomitus at the place where plaintiff fell. Obviously the jury concluded this caused her to slip. The determination of the probative value of evidence and the conclusions to be drawn from it lies in the hands of the jury. Despite the conflicting evidence, we think it was sufficient to warrant the jury in finding that there was vomitus present on the stairway which caused plaintiff to fall. This court will not substitute its judgment for the verdict of the jury unless the evidence is clearly insufficient to support the verdict. (Philpott v. Parham, 316 Ill. App. 278.)

Finally defendant urges that plaintiff failed to prove notice to the defendant of any defective condition of the stairway which was a proximate cause of the occurrence complained of. Manifestly, the jury believed that the vomitus remained on the stairway while plaintiff and Mrs. Miserendino visited the shoe department on the second floor for a period of ten or fifteen minutes. Whether, in the exercise of ordinary care, that period of time was sufficient for defendant to have discovered the vomitus was in our view a question for the jury to determine.

In Denny v. Goldblatt Bros., Inc., 298 Ill. App. 325, at page 331, the court said:

whether she exercised ordinary care for her own safety, and whether defendant was guilty of negligence were facts for the jury to determine. (Dowling v. Anderson Iron Co., 248 Ill. App. 570.)

In their brief, counsel for defendant say that what caused plaintiff to slip or fall does not appear from the evidence and that it is most likely that her fall was due to a mistep. There is no evidence tending to prove that plaintiff made a misstep. Mrs. Hieronymus testified to the presence of vomitus at the place where plaintiff fell. Obviously the jury concluded this caused her to slip. The determination of the probative value of evidence and the conclusions to be drawn from it lies in the hands of the jury. Despite the conflicting evidence, we think it was sufficient to warrant the jury in finding that there was vomitus present on the stairway which caused plaintiff to fall. This court will not substitute its judgment for the verdict of the jury unless the evidence is clearly insufficient to support the verdict. (Philpott v. Larson, 312 Ill. App. 272.)

Finally defendant urges that plaintiff failed to prove notice to the defendant of any defective condition of the stairway which was a proximate cause of the occurrence complained of. Manifestly, the jury believed that the vomitus remained on the stairway while plaintiff and Mrs. Hieronymus visited the shoe department on the second floor for a period of ten or fifteen minutes. Whether, in the exercise of ordinary care, that period of time was sufficient for defendant to have discovered the vomitus was in our view a question for the jury to determine.

In Lemon v. Goldblatt Bros., Inc., 258 Ill. App. 321, at page 323, the court said:

"Under the law defendant was required to use reasonable care to see that its premises were reasonably safe for its patrons. Whether the vomitus or milk was in the doorway such a period of time that defendant, in the exercise of ordinary care would have discovered and removed it (having in mind the great throngs that were at the store on the day in question), we think was a question for the jury. We think it cannot be said that all reasonable minds would reach the conclusion that defendant had exercised ordinary care under the circumstances."

We think the question determined in the Denny case is so nearly analogous to the one presented in this case that it should control.

For the reasons given, the trial court properly overruled defendant's motions, and the judgment is affirmed.

JUDGMENT AFFIRMED.

KILEY AND BURKE, JJ. CONCUR.

"Under the law defendant was required to use reasonable care to see that its premises were reasonably safe for its patrons, whether the vending or silk was in the doorway such a period of time that defendant, in the exercise of ordinary care would have discovered and removed it (having in mind the great throngs that were at the store on the day in question), we think was a question for the jury. We think it cannot be said that all reasonable minds would reach the conclusion that defendant had exercised ordinary care under the circumstances."

We think the question determined in the Denny case is so nearly analogous to the one presented in this case that it should control.

For the reasons given, the trial court properly overruled defendant's motions, and the judgment is affirmed.

JUDGMENT AFFIRMED.

KILEY AND MURPHY, JJ., CONCUR.

43497

WILLIAM M. WOODSON, Appellee, v. ERNEST and ADDIE BENSON, Appellants.	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is an action in forcible detainer. On March 21, 1945, the court found Addie Benson, one of the defendants, "guilty of unlawfully withholding from plaintiff possession of the premises described in the complaint." Judgment was entered on the finding and the writ of restitution stayed until April 30, 1945.

On April 13, 1945, Addie Benson filed a petition to vacate the judgment for possession and for a new trial, which was denied. Defendant appeals.

Defendant's petition alleged in substance that on March 1 and again on March 10, 1945, she tendered to plaintiff William M. Woodson the monthly rent due under the terms of the lease, which plaintiff refused to accept; that upon the trial of the cause plaintiff failed to make "proof of service of notice upon defendant of any kind or nature whatsoever prior to bringing suit," that subsequently defendant paid to plaintiff the monthly rent due for the months of March and April 1945.

The record does not contain a transcript of the trial proceedings.

Defendant Addie Benson appeared at the trial on March 21, 1945 without counsel. On the hearing of the petition in the present proceedings she testified: that no proof of service

42427

WILLIAM H. WOODSON, Appellee, v. SAMUEL and ADDIE BANKS, Appellants.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE LEWE DELIVERED the opinion of the court.

This is an action in forcible detainer. On March 21, 1945, the court found Addie Banks, one of the defendants, "guilty of unlawfully withholding from plaintiff possession of the premises described in the complaint." Judgment was entered on the finding and the writ of restitution stayed until April 30, 1945.

On April 13, 1945, Addie Banks filed a petition to vacate the judgment for possession and for a new trial, which was denied. Defendant appeals.

Defendant's petition alleged in substance that on March 1 and again on March 10, 1945, she tendered to plaintiff William H. Woodson the monthly rent due under the terms of the lease, which plaintiff refused to accept; that upon the trial of the cause plaintiff failed to make "proof of service of notice upon defendant of any kind or nature whatsoever prior to bringing suit," that subsequently defendant paid to plaintiff the monthly rent due for the months of March and April 1945.

The record does not contain a transcript of the trial proceedings.

Defendant Addie Banks appeared at the trial on March 21, 1945 without counsel. On the hearing of the petition in the present proceedings she testified: that no proof of service

of demand for the rent was made in the prior proceeding; "my husband and I were not in the divorce court. It is untrue that the last part of February I had my husband in court because of a lease he signed for another woman; he said he was going to work and that is why he is not here today."

The evidence shows that Ernest Benson, the husband of the petitioner, though named as a defendant did not appear at the trial or in the instant proceedings.

Defendant maintains that the plaintiff is bound by the allegations of the petition filed herein by reason of plaintiff's failure to traverse or put in issue the facts contained in the petition, citing Kreicker v. Naylor Pipe Co., 374 Ill. 364; The People v. City of Chicago, 378 Ill. 479; and Cleaners Guild of Chicago v. City of Chicago, 312 Ill. App. 102. None of the authorities cited involved a motion for a new trial, and therefore they have no application. Since the court did not rule upon the plaintiff to answer defendant's petition there was no necessity for plaintiff's answering. This matter rested within the discretion of the trial judge.

Defendant's next contention is that in forcible detainer proceedings proof of service of a written demand and notice on defendant must be made by the person making the service or by other legitimate evidence.

Plaintiff's counsel say in their brief, "The court examined the five-day notice, examined the plaintiff, who stated in his sworn affidavit attached to the notice, that he served the notice on the defendant. The court further examined the defendant, Addie Benson, as to whether or not the notice had been served upon her, and she admitted to the court that she had received the notice."

of demand for the rent was made in the motion proceeding; "my husband and I were not in the divorce court. It is untrue that the last part of February I had my husband in court threatening of a lawsuit he owed for another woman; he said he was going to work and that is why he is not here today."

The evidence shows that Ernest Dawson, the husband of the petitioner, though named as a defendant did not appear at the trial or in the instant proceedings.

Defendant maintains that the plaintiff is bound by the allegations of the petition filed herein by reason of plaintiff's failure to traverse or put in issue the facts contained in the petition, citing Kneisler v. Meyer Furs Co., 172 Ill. 304; The Lincoln v. City of Chicago, 272 Ill. 472; and Kimmerle Title Co. v. City of Chicago, 312 Ill. 490. None of the authorities cited involved a motion for a new trial, and therefore they have no application. Since the court did not rule upon the plaintiff's answer defendant's petition there was no necessity for plaintiff's answering. This matter rested within the discretion of the trial judge.

Defendant's next contention is that in Juvenile Delinquency proceedings proof of service of a written demand and notice on defendant must be made by the person making the service or by other legitimate evidence.

Plaintiff's counsel say in their brief, "the court examined the five-day notice, examined the plaintiff, who stated in his sworn affidavit attached to the notice, that he served the notice on the defendant. The court further examined the defendant, Addie Dawson, as to whether or not the notice had been served upon her, and she admitted to the court that she had received the notice."

Proof of service of a proper demand upon the defendant by the plaintiff was an indispensable element of his cause of action. The presumption is that the evidence was sufficient to support or sustain the findings made and to justify the conclusion reached by the trial court, especially as here where the record contains no statement of the evidence. (3 Am. Jur., Appeal and Error, Sec. 954, p. 517.)

So far as the record shows, there was no new testimony offered in the instant proceeding to warrant the trial court in disturbing the judgment.

For the reasons stated, the judgment is affirmed.

JUDGMENT AFFIRMED.

KILEY AND BURKE, JJ. CONCUR.

Proof of service of a proper demand upon the defendant by the plaintiff was an indispensable element of his cause of action. The presumption is that the evidence was sufficient to support or sustain the findings made and to justify the conclusion reached by the trial court, especially as here where the record contains no statement of the evidence. (3 Ca. Jur., Appeal and Error, Sec. 664, p. 317.)

So far as the record shows, there was no new evidence offered in the instant proceeding to warrant the trial court in disturbing the judgment.

For the reasons stated, the judgment is affirmed.

JEFFERY, J.

KILBY AND CONCUR, JJ. CONCUR.

43704

330 I.A. 249

DR. G. E. SANDSTEDT, Plaintiff (Appellee), v. CONSUMERS ICE COMPANY, a corporation, Defendant (Appellant).	APPEAL FROM SUPERIOR COURT COOK COUNTY.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Dr. G. E. Sandstedt filed a complaint in the Superior Court of Cook County against the Consumers Ice Company and Langdon Bauwens to recover damages for personal injuries suffered as a result of tripping and falling over two sidewalk doors covering the basement sidewalk elevator of the building at 6 North Clark Street, Chicago. Issue was joined. On motion of plaintiff the individual defendant was dismissed. A trial before the court and a jury resulted in a verdict against the corporate defendant for $5,000. Motions for a directed verdict and for a new trial were overruled and judgment was entered on the verdict. Defendant appealed.

At 11:00 a. m. on December 28, 1943 plaintiff, a doctor of medicine, who had practiced his profession since 1907, was walking in a northernly direction on the west sidewalk of Clark Street in Chicago. He had been at the Continental Illinois Bank Building. The lifting of a door in the sidewalk caused him to stumble. The door was lifted by a servant of defendant. There was competent evidence to support a finding by the jury that plaintiff was, at and about the time of the occurrence, in the exercise of due care for his own safety, and that the resulting injuries were proximately caused by the negligence of defendant's servants.

DR. G. E. BANDIST DT,	APPEAL FROM
Plaintiff (Appellee),	
v.	SUPERIOR COURT
CONSUMERS ICE COMPANY, a corporation,	COOK COUNTY.
Defendant (Appellant).	

MR. JUSTICE SCHAFF DELIVERED THE OPINION OF THE COURT.

Dr. G. E. Bandist filed a complaint in the Superior Court of Cook County against the Consumers Ice Company and Langdon Kenyons to recover damages for personal injuries suffered as a result of tripping and falling over two sidewalk doors covering the basement sidewalk elevator of the building at 2 North Clark Street, Chicago. Issue was joined. On motion of plaintiff the individual defendant was dismissed. A trial before the court and a jury resulted in a verdict against the corporate defendant for $5,000. Motions for a directed verdict and for a new trial were overruled and judgment was entered on the verdict. Defendant appealed.

At 11:00 a. m. on December 22, 1942 plaintiff, a doctor of medicine, who had practiced his profession since 1907, was walking in a northerly direction on the west sidewalk of Clark Street in Chicago. He had been at the Continental Illinois Bank Building. The lifting of a door in the sidewalk caused him to stumble. The door was lifted by a servant of defendant. There was competent evidence to support a finding by the jury that plaintiff was, at and about the time of the occurrence, in the exercise of due care for his own safety, and that the resulting injuries were proximately caused by the negligence of defendant's servants.

Defendant contends that the verdict is so grossly excessive as to evince passion, prejudice and ill-will upon the part of the jury against it. Plaintiff maintains that the verdict is amply supported by the evidence and that it is not excessive. When plaintiff fell to the sidewalk, he was dazed, but remembered someone picking him up. He then took part in a conversation with bystanders and with defendant's driver. Plaintiff gave the driver his card. The driver wrote defendant's name on it and returned it to plaintiff. Plaintiff told a witness he did not think he needed to go to a hospital. He also refused the offer of a policeman, who appeared on the scene, to go to a hospital. The injuries claimed by plaintiff as a result of his fall were: a skin abraison above the left eye described as a "slight scratch" about an inch long, which healed in eight or ten days; a superficial skin abraison about one half inch long under the left eye over the malar bone; a superficial abraison about one half inch long on the outside of the lip; a deep cut on the inside of the lip; and an abraison about an inch and a half long on the little finger of his left hand. These abraisons caused blood to appear on his face. No other portion of his body was cut.

At the suggestion of the driver plaintiff, unassisted and alone, walked from the place of the mishap to defendant's office in the Conway Building, a distance of a block. At defendant's office he was directed to go to Dr. Smith's office at 166 West Jackson Boulevard. Plaintiff, by himself and unassisted, walked from the Conway Building to Dr. Smith's office, a distance of six blocks. There he was examined by a doctor. A nurse cleansed his wounds and put a little gauze dressing with adhesive tape on his forehead and finger. He was there about a half hour. He then walked to Clark Street and Jackson Boulevard and took a street car to his home at 1921 Berteau Avenue, arriving there about 1:00 p.m.

Defendant contends that the verdict is so grossly excessive as to evince passion, prejudice and ill-will upon the part of the jury against it. Plaintiff maintains that the verdict is amply supported by the evidence and that it is not excessive. When plaintiff fell to the sidewalk, he was dazed, but recovered somewhat quickly like so. In less than a minute he was conversation with bystanders and with defendant's driver. Plaintiff gave the driver his card. The driver wrote defendant's name on it and returned it to plaintiff. Plaintiff told a witness he did not think he needed to go to a hospital. He also refused the offer of a policeman, who appeared on the scene, to go to a hospital. The injuries claimed by plaintiff as a result of his fall were: a skin abrasion above the left eye described as a "slight scratch" about an inch long, which healed in eight or ten days; a superficial skin abrasion about one half inch long under the left eye over the malar bone; a superficial abrasion about one half inch long on the outside of the lip; a deep cut on the inside of the lip; and an abrasion about an inch and a half long on the little finger of his left hand. These abrasions caused blood to appear on his face. No other portion of his body was cut.

At the suggestion of the driver plaintiff, unassisted and alone, walked from the place of the mishap to defendant's office in the Conway Building, a distance of 2 blocks. At defendant's office he was directed to go to Dr. Smith's office at 105 West Jackson Boulevard. Plaintiff, by himself and unassisted, walked from the Conway Building to Dr. Smith's office, a distance of six blocks. There he was examined by a doctor. A nurse cleansed his wounds and put a little gauze dressing with adhesive tape on his forehead and finger. He was there about a half hour. He then walked to Clark Street and Jackson Boulevard and took a street car to his home at 1021 Fertona avenue, arriving there about 1:00 p.m.

He had lunch and laid down for a half hour. He testified that on that day and for several succeeding days he was dazed and a week later started to get dizzy. After lying down for a half hour after lunch on the day of the occurrence, he went back to work, walking the two blocks from his home to his office and walking up the steps to his office. That same afternoon he performed his usual duties. He left his office at 5:30, the usual time, returned to his home, had dinner, laid down about 20 minutes, left the house at 6:30, the usual time, returned to his office, and that night again performed his usual duties. His regular office hours were from 10:00 a.m. to 8:00 p.m., with time off for lunch and dinner at home. He went back to work the next day and evening and went through his usual routine. His eye was closed. He was very busy and kept on the go all the time. When he got through with one patient, another was there. He did not have any broken bone or fracture. X-rays taken within a week after the occurrence were negative. His left hand was sore. There was not much pain in the injuries on his face, excepting the upper lip and his teeth which remained sore for a long time.

He was employed at a Sanitoria. He reported for work every day since the occurrence and carried out his usual duties. He did not lose any income since the occurrence. He worked on a salary, which has not decreased. Although he testified that he turned down off hour calls since the occurrence, he did not testify how many he turned down, or what, if anything he lost by way of fees. Since his connection with the Sanitoria he has not been in independent practice. He complained of dizziness about a week after the mishap. Although an experienced physician, he did not seek or receive any treatment after the "first aid" treatment on the day of the occurrence, other than having the abraison on his finger

He had lunch and lay down for a half hour. He testified that on that day and for several succeeding days he was dazed and a week later started to get dizzy. After lying down for a half hour after lunch on the day of the occurrence, he went back to work, walking the two blocks from his home to his office and walking on the stairs to his office. That same afternoon he performed his usual duties. He left his office at 5:30, the usual time, returned to his home, had dinner, laid down about 30 minutes, left the house at 6:30, the usual time, returned to his office, and that night again performed his usual duties. His regular office hours were from 10:00 a.m. to 8:00 p.m., with time off for lunch and dinner at home. He went back to work the next day and evening and went through his usual routine. His eye was closed. He was very busy and kept on the go all the time. When he got through with one patient, another was there. He did not have any broken bone or fracture. X-rays taken within a week after the occurrence were negative. His left hand was sore. There was not much pain in the injuries on his face, excepting the upper lip and his teeth which remained sore for a long time.

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and the abraison over his eye taken care of by a nurse at his office. His sole consultation with a physician was not until three or four weeks later, when he went to an eye specialist to have his eyes tested. This specialist gave him no treatment and found nothing wrong with his eyesight. In March, 1944, at the request of defendant, plaintiff went to Dr. Lamb for examination. The latter looked at plaintiff's eyes and tested his reflexes. Plaintiff told Dr. Lamb he had X-rays taken, but that they were negative. Dr. Lamb gave him no treatment and nothing developed as a result of this examination. Thereafter plaintiff was feeling pretty good, but "the dizziness never did disappear exactly." After his visit to Dr. Lamb in March, 1944, plaintiff still did not receive or seek any examination or treatment until June 10, 1944. On that date, almost six months after the mishap, he first began to have a "tingling sensation" in his hands whenever he moved them "back and forth". He did not see any physician about it and had no examination, but had an osteopath at the Sanitoria give him daily manipulation treatments. There was no relief, so he had Dr. Nystul give him similar treatments for about a month, with the same result.

On August 8, more than seven months after the occurrence, he went to Dr. Winters, who made a diagnosis and gave him "suture" treatments. In giving these treatments, the doctor with his hands applied pressure to plaintiff's head and had plaintiff inhale and exhale. A complete treatment took about ten minutes. Dr. Winters took no X-rays. Plaintiff had immediate relief from the first treatment. He continued these treatments once a week for 11 weeks, until October 17. He had further treatments commencing October 31, 1944 and ending November 6, 1945. After each treatment he would return to his own office and carry on his usual duties. These treatments gave him relief and after the first six or seven, the "tingling" passed entirely, but the dizziness did not. During the period from August 8, 1944 when he first saw Dr. Winters, up to his last treatment

and the abrasion over his eye taken care of by a nurse at his office. His sole consultation with a physician was not until three or four weeks later, when he went to an eye specialist to have his eyes tested. This specialist gave him no treatment and found nothing wrong with his eyesight. In March, 1944, at the request of defendant, plaintiff went to Dr. Lamb for examination. The latter looked at plaintiff's eyes and tested his reflexes. Plaintiff told Dr. Lamb he had X-rays taken, but that they were negative. Dr. Lamb gave him no treatment and nothing developed as a result of this examination. Thereafter plaintiff was feeling pretty good, but "the dizziness never did disappear exactly." After his visit to Dr. Lamb in March, 1944, plaintiff still did not receive or seek any examination or treatment until June 10, 1944. On that date, almost six months after the mishap, he first began to have a "tingling sensation" in his hands whenever he moved them "back and forward". He did not see any physician about it and had no examination, but had an osteopath at the sanitorium give him daily manipulation treatments. There was no relief, so he had Dr. Crystal give him similar treatments for about a month, with the same result.

On August 8, more than seven months after the occurrence, he went to Dr. Hintzen, who made a diagnosis and gave him "nerve" treatments. In giving these treatments, the doctor with his hands applied pressure to plaintiff's head and had plaintiff imagine his ankle. A complete treatment took about ten minutes. Dr. Hintzen took no X-rays. Plaintiff had immediate relief from the first treatment. He continued these treatments once a week for 11 weeks, until October 17. He had further treatments commencing October 31, 1944 and ending November 8, 1945. After each treatment he would return to his own office and carry on his usual duties. These treatments gave him relief and after the first six or seven, the "tingling" ceased entirely, but the dizziness did not. During the period from August 8, 1944 when he first saw Dr. Hintzen, up to his last treatment

in 1945, plaintiff did not have any other treatment except some diathermy treatments at his own office. These treatments did not begin until after he went to Dr. Winters. All told, plaintiff had probably 100 treatments. None of these were given to him until six months after the occurrence. In answer to a question by his attorney as to how he felt, he said he was very busy at his office, has to move pretty fast, and sometimes has to catch himself on account of dizziness; otherwise, he felt "pretty good." He did not receive any bill from Dr. Winters or any other physician for or on account of any services rendered to him, nor did plaintiff pay anything to any doctor or to any other person as a result of the occurrence, except some out-of-pocket expenses, "probably $25 or $30." There was no medical testimony offered to support plaintiff's charge that his condition was caused by the mishap, or that the condition was permanent.

From 1907 to 1939 plaintiff had been engaged in general practice. Since 1939 and up to and including the time of the trial, he was the medical director at the Dr. Nystul Sanitoria, a physiotheraphy institution, located at 1930 Irving Park Boulevard, Chicago. He was the only physician at the Sanitoria during this time and was the only one there who examined, diagnosed and decided upon the treatments to be given patients. He examined and treated from 20 to 40 patients during the average day. The treatments consisted of making injections into hemorrhoids, varicose veins, hernia, and giving intravenous treatments. He alone performed these operations. In making rectal injections he would place the patient on a table and inject a rectal dilator into the rectum, find the hemorrhoid and inject a two inch needle, which was attached to a glass syringe, into the hemorrhoid. In giving the hernia injections he would also use a needle. These operations are highly specialized and

in 1926, plaintiff did not have any other treatment except some diathermy treatments at his own office. These treatments did not begin until after he went to Dr. Winters. All told, plaintiff had probably 100 treatments. None of these were given to him until six months after the occurrence. In answer to a question by his attorney as to how he felt, he said he was very busy at his office, has to move pretty fast, and sometimes has to enter himself on account of disease; otherwise, he felt "pretty good." He did not receive any bill from Dr. Winters or any other physician for or on account of any services rendered to him, nor did plaintiff pay anything to any doctor or to any other person as a result of the occurrence, except some out-of-pocket expenses, "probably 25 or 30." There was no medical testimony offered to support plaintiff's charge that his condition was caused by the mishap, or that the condition was permanent.

From 1907 to 1929 plaintiff had been engaged in general practice. Since 1929 and up to and including the time of the trial, he was the medical director at the Dr. Wyatt Sanitorium, a physiotherapy institution, located at 1800 Irving Park Boulevard, Chicago. He was the only physician at the sanitorium during this time and was the only one there who examined, diagnosed and decided upon the treatments to be given patients. He averaged and treated from 30 to 40 patients during the average day. The treatments consisted of saline injections into hemorrhoids, varicose veins, hernia, and giving intravenous treatments. He alone performed these operations. In making rectal injections he would place the patient on a table and inject a rectal dilator into the rectum, find the hemorrhoid and inject a two inch needle, which was attached to a glass syringe, into the hemorrhoid. In giving the hernia injections he would also use a needle. These operations are highly specialized and

exacting. In addition he treated all kinds of chronic diseases such as arthritis and colon trouble. Defendant offered no evidence.

There was no medical testimony or any other testimony that showed or tended to show any causal connection between the claimed condition arising in June, 1944 and thereafter and his fall on the sidewalk in December, 1943. He worked as usual the afternoon of the mishap and every day thereafter from 10:00 a.m. to 8:00 p.m., examining and performing exacting operations on from 20 to 40 patients a day. He did not seek or receive treatment of any kind until six months after his fall. He had no broken bone or fracture. He testified that he was dazed for about a week and later became dizzy. In our opinion, the verdict is grossly excessive. Defendant urges that the court erred in giving five instructions for plaintiff. We agree with plaintiff that the criticisms leveled at these instructions are hypercritical. In our judgment, there should be a remittitur of $2,000.

For the reasons stated the judgment of the Superior Court of Cook County is affirmed upon plaintiff filing a remittitur of $2,000 within 10 days; otherwise, the judgment is reversed and the cause remanded with directions for a new trial.

JUDGMENT AFFIRMED UPON REMITTITUR OF
$2,000 WITHIN 10 DAYS; OTHERWISE,
JUDGMENT REVERSED AND CAUSE REMANDED
FOR A NEW TRIAL.

LEWE, P.J. AND KILEY, J. CONCUR.

exercising. In addition he treated all kinds of chronic diseases such as arthritis and colon trouble. Defendant offered no evidence.

There was no medical testimony or any other testimony that showed or tended to show any causal connection between the claimed condition arising in June, 1944 and thereafter and his fall on the sidewalk in December, 1945. He worked as usual the afternoon of the mishap and every day thereafter from 10:00 a.m. to 8:00 p.m., examining and performing chiropractic corrections on from 30 to 40 patients a day. He did not seek or receive treatment of any kind until six months after his fall. He had no broken bone or fracture. He testified that he was dazed for about a week and later became dizzy. In our opinion, the verdict is grossly excessive. Defendant urges that the court erred in giving five instructions for plaintiff. We agree with plaintiff that the criticism leveled at these instructions are hypercritical. In our judgment, there should be a remittitur of $5,000.

For the reasons stated the judgment of the superior Court of Cook County is affirmed upon plaintiff filing a remittitur of $5,000 within 10 days; otherwise, the judgment is reversed and the cause remanded with directions for a new trial.

JUDGMENT AFFIRMED UPON REMITTITUR OF $5,000 WITHIN 10 DAYS; OTHERWISE, JUDGMENT REVERSED AND CAUSE REMANDED FOR A NEW TRIAL.

LUCE, P.J. AND HILDY, J., CONCUR.

43607

DANIEL C. BRINEY, a minor, etc., Appellee, v. ILLINOIS CENTRAL RAILROAD COMPANY, a corporation, Appellant.	APPEAL FROM CIRCUIT COURT COOK COUNTY.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is the second appeal in a personal injury action arising out of an accident in which plaintiff on July 7, 1937, when he was 8 years and 9 months old, suffered injuries as a result of which his left leg was amputated a few inches below the hip. We reversed a judgment for plaintiffs for $40,000 in the first appeal (324 Ill. App. 375) and remanded the cause for a new trial. This appeal is taken by defendant from a judgment upon the second verdict in plaintiff's favor for $35,000.

The accident happened in Riverdale, Illinois, through which defendant's right of way, carrying 7 sets of track, passes. At about 140th Street the right of way of the Indiana Harbor Belt R. R. extends east and west at grade. The defendant's right of way over-passes the Belt right of way at this point. All streets between 138th and 144th are dead end streets on both sides of defendant's right of way. Vehicular and pedestrian viaducts carry traffic underneath its right of way at 138th Street and 144th Street. Upon this right of way, counting from the west, tracks No. 1 and No. 2 carry suburban trains; tracks No. 3 and No. 4 passenger trains; tracks No. 5 and No. 6 freight trains; and track No. 7, known as the interchange track, also carries freight. The trains for this latter track are made up in the Markham Yard at 157th Street and are carried north to about 141st Street, where the interchange track curves northeast and downward toward the Belt tracks. At grade the trains are switched onto

43807

DANIEL O. DRINKWI, a minor, etc., Appellee,	APPEAL FROM
v.	CIRCUIT COURT
ILLINOIS CENTRAL RAILROAD COMPANY, a corporation, Appellant.	COOK COUNTY.

330 I.A. 850

MR. JUSTICE MILLER DELIVERED THE OPINION OF THE COURT.

This is the second appeal in a personal injury action arising out of an accident in which plaintiff on July 7, 1877, when he was 8 years and 9 months old, suffered injuries as a result of which his left leg was amputated a few inches below the hip. We reversed a judgment for plaintiffs for $40,000 in the first appeal (334 Ill. App. 275) and remanded the cause for a new trial. This appeal is taken by defendant from a judgment upon the second verdict in plaintiff's favor for $35,000.

The accident happened in Riverdale, Illinois, through which defendant's right of way, carrying 7 sets of tracks, passes. At about 140th street the right of way of the Indiana Harbor Belt R. R. extends east and west at grade. The defendant's right of way over-passes the Belt right of way at this point. All streets between 138th and 144th are dead end streets on both sides of defendant's right of way. Vehicular and pedestrian viaducts carry traffic underneath its right of way at 139th street and 144th street. Upon this right of way, counting from the west, tracks No. 1 and No. 2 carry suburban trains; tracks No. 3 and No. 4 passenger trains; tracks No. 5 and No. 6 freight trains; and track No. 7, known as the interchange track, also carries freight. The trains for this latter track are made up in the Markham yard at 157th street and are carried north to about 141st street, where the interchange track curves northeast and downward toward the Belt tracks. At grade the trains are switched onto

the Belt right of way and moved west. At about 142nd Street there is a signal tower supported by two upright posts - one on the east, located between tracks 6 and 7 and one on the west between 1 and 2.

On the day of the accident plaintiff had spent the forenoon in Riverdale Park, adjoining the defendant's right of way on the west between 137th and 138th Streets, with Russell Reichert, then 12, and Bobby and Billy Sutton then, respectively, 14 and 12. He lunched at Reicherts, then, with the others, shot off firecrackers in the Belt underpass, after which they emerged on the east and climbed by a footpath up to defendant's right of way and awaited the freight train which came north on track 7 daily at 1:30 P.M. Several minutes later the train consisting of 45 freight cars with a caboose at the north end, all being pushed by the engine at the south end of the train, passed the boys on its way upon the curve to the northeast. After several cars had passed, the Sutton boys "jumped on." Plaintiff tried to board the train but lost his grip on the ladder and the accident followed. No signal of any kind was given of the approach of the train. The conductor of the train was riding in the caboose, but on the east side at a window where he could communicate signals to the engineer. With him was the flagman who was seated facing north just inside the open door at the north end of the caboose. The brakeman was seated on the east side of a tank car. None of these men and neither of the two in the engine cab had any knowledge of the accident until after it occurred.

At the trial several amendments were made to the original complaint. The vital issues submitted to the jury were whether plaintiff was in a place of danger at defendant's invitation implied in a previous custom, known to defendant, under which boys

the Belt right of way and moved west. At about 145th Street there is a signal tower supported by two upright posts - one on the east, located between tracks 6 and 7 and one on the west between 1 and 2.

On the day of the accident plaintiff had spent the forenoon in Riverdale Park, adjoining the defendant's right of way on the west between 137th and 138th Streets, with Russell Holbert, then 12, and Bobby and Billy Button them, respectively, 14 and 12. He lunched at Holbert's, then, with the others, shot off firecrackers in the Belt underpass, after which they emerged on the east and climbed by a footpath up to defendant's right of way and awaited the freight train which came north on track 7 daily at 1:30 P.M. Several minutes later the train consisting of 45 freight cars with a caboose at the north end, all being pushed by the engine at the south end of the train, passed the boys on its way upon the curve to the northbent. After several cars had passed, the Button boys "jumped on." Plaintiff tried to board the train but lost his grip on the ladder and the accident followed. No signal of any kind was given of the approach of the train. The conductor of the train was riding in the caboose, but on the east side at a window where he could communicate signals to the engineer. With him was the flagman who was seated facing north just inside the open door at the north end of the caboose. The brakeman was seated on the east side of a tank car. None of these men and neither of the two in the engine cab had any knowledge of the accident until after it occurred.

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other than plaintiff boarded defendant's moving train and threw switches in return for gifts from defendant's employees; whether defendant negligently breached its duty to plaintiff by failing, with knowledge of the alleged custom, to give him warning and provide a lookout while backing its train and to use ordinary care to protect him in danger; and whether the alleged negligence, or misconduct on plaintiff's part, was the proximate cause of plaintiff's injury.

The defendant claims the trial court committed error in refusing to sustain its motion to strike certain paragraphs of the complaint as failing to state a cause of action. Plaintiff says, defendant does not deny, and we hold, that by filing its answer defendant waived the claimed error. Bransfield v. Bransfield, 310 Ill. App. 394.

Plaintiff contends that we should not consider the question whether plaintiff was an invitee or trespasser, because we decided that question on the first appeal. He says that the question was one of law and conclsuive on this appeal. We reversed the judgment in the first appeal because the trial court refused to give an instruction for defendant that it had no duty to fence its right of way. We decided on the record before us, that the question whether plaintiff was a trespasser or invitee was for the jury. Our decision on that question on the instant appeal must rest on the record now before us. If the record is substantially the same, we should come to a like decision.

Defendant contends that plaintiff was a trespasser at the time of the injury to whom it owed no duty except to refrain from doing him wilful and wanton injury. It refers us to Maskaliunas v. C. & W. I. R. R. Co., 318 Ill. 142, where a child about 8 years old lost his leg attempting to climb a moving train.

other than plaintiff boarded defendant's moving train and threw switches in return for gifts from defendant's employees; whether defendant negligently breached its duty to plaintiff by failing, with knowledge of the alleged custom, to give him warning and provide a lookout while boarding its train and to use ordinary care to protect him in danger; and whether the alleged negligence, or misconduct on plaintiff's part, was the proximate cause of plaintiff's injury.

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The court said the plaintiff there was a trespasser. In that case there was no claim or evidence that the plaintiff was invited to board moving trains in aid of the trainmen. In other cases to which we are referred on this point, the court found that the injured person was a trespasser. To assume that fact here would be to beg the important question, whether plaintiff at the time of the injury was an invitee or a trespasser. Defendant insists that we should find it not guilty upon a finding that plaintiff was, in fact, a trespasser. Plaintiff says that this question was for the jury.

The vital issue of fact in the question is whether defendant impliedly invited plaintiff to come upon its right of way and throw switches for the defendant's employees in exchange for gifts. If the testimony with reference to the custom is eliminated from our consideration as being beyond credibility, or if there is no testimony which tends to prove such a custom, or if finally upon considering all the evidence of the custom, reasonable men would come to but one conclusion which is that there was no such custom, the case for plaintiff will fail. There is no other theory in the pleading upon which the verdict can stand.

All testimony with reference to the motive for plaintiff and his companions' presence on the right of way the day of the accident was excluded by the ruling of the trial court. The only testimony in the record of any custom, related to time preceding the accident. The testimony was given by two witnesses, Reichert who was with plaintiff on the right of way the day of the accident and Wilkins who was not a companion of plaintiff's, but arrived to help him after the accident occurred.

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The substance of their testimony was that several days a week, several boys would wait for the interchange train between tracks 6 and 7; that a trainman would give them a signal and they would throw "the switch", board the train, ride to the next switch and throw it, board the train again, ride to a third switch and throw it; that there were three switches on track No. 7 on the way down and one coming back into the Belt Railroad right of way; and that in exchange for the switching they were given fruit "out of the box cars" and fusees.

Defendant says that the testimony in proof of the custom is so inherently improbable and so against known physical facts, as to be unworthy of belief. The rule is that if testimony reports a physical impossibility, it must be rejected as not in accordance with the truth; (I. C. R. R. Co., v. McMillion, 129 Ill. App. 27) if of inherent improbability, a court may be justified in disregarding it, even if uncontradicted; (Kelly v. Jones, 290 Ill. 375) or if contradictory of the laws of nature or universal human experiences, so as to exceed the limits of human belief, the court is not bound to believe it. Mannen v. Norris, 338 Ill. 322.

If there was anything inherently improbable in the testimony of the witnesses to the custom, it should appear without reference to any defense testimony. We fail to see any inherent improbability. We are not prepared to say that the testimony of these witnesses is contrary to the general knowledge and experience of mankind or that it exceeds human belief. Cases cited by defendant, or referred to in cases cited by defendant, contain facts which support our view. There is no question of the testimony contravening laws of nature or of science. The question whether the testimony is necessarily impossible under the circumstances of the case includes consideration of the defense testimony.

The substance of their testimony was that several days a week, several boys would wait for the interchange train between tracks 6 and 7; that a trainman would give them a signal and they would throw "the switch", board the train, ride to the next switch and throw it, board the train again, ride to a third switch and throw it; that there were three switches on track No. 7 on the way down and one coming back into the Belt Railroad right of way; and that in exchange for the switching they were given fruit "out of the box cars" and tissues.

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Defense testimony of the physical circumstances discloses discrepancies in the testimony of the witnesses, If the train traveled on track 7, it would be impossible for 3 switches to be thrown. The first switch on track 7 has no use for a train traveling on that track. Its use is to complete the switch of a train from track 6 to track 7. The only switch which could be used where a train traveled exclusively on track 7 is at the Wye. The boys testified that the interchange train used track No. 7 "every day" and "seven days a week." There is also testimony that the train used track No. 6 once a month or so. Reichert testified that the boys waited for the train between track 6 and 7. They would not wait here if the train used track No. 6. If we could say with certainty that the testimony of the boys was limited to switches on track 7, there would be merit in defendant's contention as to physical impossibility.

On cross-examination one of plaintiff's witnesses said the first switch was after the tracks leave the top of the hill and have started down grade; that one is right after the turn to come off the right of way; and that he didn't believe there was any switch on the top of the right of way. Then the following transpired in the examination:

> "Q. Examine this. Here are the other two also. That is correct, isn't it?
>
> A. Yes."

There is nothing in the record to show what "this" referred to. It is not certain that the reference is to plaintiff's exhibit, or photograph of the interchange track on the down grade, though during previous examination plaintiff and the examiner were examining that photograph. There is no indication what counsel meant by "the other two." It would seem he was referring to the other two of the three switches which plaintiff had testified to. We infer from the question and answer quoted hereinabove and from the testimony

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On cross-examination one of plaintiff's witnesses said the first switch was after the trucks leave the top of the hill and have started down grade; that one is right after the turn to come off the right of way; and that he didn't believe there was any switch on the top of the right of way. Then the following transpired in the examination:

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of Wilkins, that defense counsel did not consider Wilkins' testimony as limited to track 7. It was possible for the train to come on track 6, one switch to be thrown to move it on to the interchange track, the second switch to be thrown there to complete this movement, and the third switch to be thrown to move the train into the north branch of the Wye. This would leave the "one coming back into the Harbor track." The boys did not testify that they went to the right of way every day. The fact that the trainmen testified to a switching procedure which would exclude that testified to by the witnesses is not relevant on this point.

We cannot say either that the disputed testimony is necessarily impossible, because of the defense testimony that the switches used for the movement from track 6 to 7 were locked except when the trainmen who kept the keys unlocked them. The testimony was that these cross-over switches were locked at all times. This is a difficult question. We do not feel it is one we must answer on the basis that it would be a physical impossibility for the switches to have been unlocked while the custom was being pursued. We see no merit to the contention that because the switch lever weighed 35 pounds and moved approximately 900 pounds of rail, that the testimony should not be believed. There was testimony that a "gang" of six or eight boys joined in the activity and that the steel rods slid on greased metal plates.

Because of the foregoing conclusions we believe there was evidence tending to prove the custom. There was evidence tending to prove that there was a custom prior to the day of the accident. There is also evidence, aside from that excluded, given by plaintiff as well as Russell Reichert from which the jury could infer that the reason for the presence of the boys on the right of way on that day was in pursuit of the custom.

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We cannot say either that the disputed testimony is necessarily incredible, because of the defense testimony that the switches used for the movement from track 6 to 7 were locked except when the trainmen who left the keys unlocked them. The testimony was that these cross-over switches were locked at all times. This is a difficult question. We do not feel it is one we must answer on the basis that it would be a logical impossibility for the switches to have been unlocked while the engine was being moved. We see no merit to the contention that although the switch lever weighed 25 pounds and moved approximately 300 pounds if full, that the testimony should not be believed. There was testimony that a "gang" of six or eight men worked in the vicinity and that the steel rods slid on greased metal plates.

Because of the foregoing conclusion we believe there was evidence tending to prove the question. There was evidence tending to prove that there was a master switch to the top of the switchlight. There is also evidence, which from that standpoint, given by plaintiff as well as Russell Hulchert from which the jury could infer that the reason for the presence of the boys on the right of way on that day was in pursuit of the matter.

Defendant contends there was no evidence that an invitation was extended to plaintiff; none of a duty on defendant's part to provide a lookout to warn plaintiff; and none that it was guilty of negligence which proximately caused plaintiff's injury. There is no material change in the testimony on plaintiff's behalf in the two trials. In the first case we decided these contentions against defendant and we believe the same decision is proper in this case. The same is true of the question of plaintiff's contributory negligence. Maskaliunas v. C. & W. I. R. R. Co., 318 Ill. 142; Briney v. I. C. R. R. Co., 324 Ill. App. 375.

We hold that the trial court properly submitted plaintiff's case to the jury. Defendant's motion for a directed verdict and judgment notwithstanding the verdict were properly denied.

Defendant also argues that the verdict is against the manifest weight of the evidence.

The boys who testified on this trial, by their testimony, placed themselves more than 50 feet north of the signal blocks until the train came along. In the first trial they said they were right at the blocks on the north side. This change in testimony, defendant says, was made to bolster the failure of the lookout theory and to avoid the predicament of being where it would have done no good to have had a lookout. This was involved in the juries' consideration of defendant's negligence. It may have decided that a lookout should have been where he could have seen the boys to warn them in either event. The same can be said with respect to plaintiff's attempt to climb on the train after the caboose and several cars had gone by. The jury heard the impeaching testimony, observed the witnesses when confronted with the difference in testimony and heard what explanations were given therefor.

Defendant contends there was no evidence that an invitation was extended to plaintiff; none of a duty to defendant; part to provide a lookout to warn plaintiff; and none that it was guilty of negligence which proximately caused plaintiff's injury. There is no material change in the testimony on plaintiff's behalf in the two trials. In the first case we decided these contentions against defendant and we believe the case decision is proper in this case. The case is free of the question of plaintiff's contributory negligence. Martinovich v. C. R. I. & P. R. R. Co., 218 Ill. 162; Brown v. I. C. R. R. Co., 254 Ill. 404. etc.

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The accident occurred in July 1937. Briney was then less than 9 years old, Reichert 11½ and Wilkins 14. The first trial was in 1942. The instant trial in 1945. At this trial Reichert said things were fresher in his mind at the first trial.

Defendant's introduction of its rules, prohibiting giving away of its property by employees and limiting the authority to unlock switches; of the statutes and ordinances referring to boarding moving trains and the delinquency; and its argument that giving authority to employees to extend the invitation would be ultra vires, were part of defendant's case bearing upon its theory that the story of the custom was incredibile. We see no merit to the contention that the employees had no authority to invite the boys and that defendant should not, therefore, be liable. In the first appeal we showed the inapplicability of Oatman v. St. Louis Southwestern R. R. 263 S. W. 139, cited to the contention. Bourne v. Southern Ry. Co., 33 S. E. (2) 239 presents a radically different situation than confronts us. In Smith v. Terminal R. R. 85 S. W. (2) 425 plaintiff was on the tracks solely for his own benefit.

The cases cited dealing with trespassers are not pertinent. The jury saw and heard plaintiff; they had testimony such as that he grew up in a railroad atmosphere, from which to infer his intelligence and to make a fair test of his prudence at the time of the accident. It had the disputed testimony as to previous warnings given him and a warning from one of the boys against boarding the train on the day of the accident. We cannot say that any finding that he used ordinary care under the circumstances was wrong.

Defendant further contends that the testimony of the boys referring to the custom is especially against the overwhelming weight of the evidence. I t is not necessary for us to state whether plaintiff's evidence convinced us. On motion for a new trial the

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Defendant further contends that the testimony of the boys referring to the custom is manifestly against the overwhelming weight of the evidence. It is not necessary for us to state whether plaintiff's evidence convinced us. On motion for a new trial the

trial court refused to set aside the verdict as against the manifest weight of the evidence. The jury must have believed the witnesses for the plaintiff. We cannot say it should not have. This was the second jury that believed testimony in plaintiff's behalf. We cannot say the verdict is against the clear weight of the evidence. We have read the cases cited on this point by defendant in arriving at our conclusion.

Defendant complains of certain instructions given for plaintiff. We think instruction No. 13 was correct. This follows from what we have said of the right of the jury to infer the purpose of the boys on the day of the accident, from the testimony of the purpose of other boys previously, and from what we have said of the claim that the evidence failed to show authority on the part of defendant's employees to extend the invitation. Our conclusions in this opinion so far, also led us to determine that instruction No. 14 is proper. We do not think that the word "warning" was misleading. The instruction sufficiently stated the requirement of plaintiff's due care.

We think the trial court properly refused defendant's instruction No. 3. It is preemptory. It disregards the elements of plaintiff's status at the time of the accident. In C. R. I. & P. Ry. Co. v. Eininger, 114 Ill. 79; and C. & W. I. R. R. Co. v. Roath, 35 Ill. App. 349, the instruction was justified on the evidence presented. Instruction No. 4 was properly refused. Without stating the hearing of the Village Ordinance on this case, it was confusing. The same is true of revised instruction No. 5. There was no contention by anyone that plaintiff was a licensee. Defendant's position was that he was a trespasser. Plaintiff's that he was an invitee. In any event given instruction No. 15 protected defendant on the point.

trial court refused to set aside the verdict as against the manifest weight of the evidence. The jury must have believed the witnesses for the plaintiff. We cannot say it should not have. This was the second jury that believed testimony in plaintiff's behalf. We cannot say the verdict is against the clear weight of the evidence. We have read the cases cited on this point by defendant in arriving at our conclusion.

Defendant complains of certain instructions given for plaintiff. We think instruction No. 12 was correct. This follows from what we have said of the right of the jury to infer the purpose of the boys on the day of the accident, from the testimony of the purpose of other boys previously, and from what we have said of the claim that the evidence failed to show authority on the part of defendant's employees to extend the invitation. Our conclusions in this opinion so far, also led us to determine that instruction No. 14 is proper. We do not think that the word "warning" was misleading. The instruction sufficiently stated the requirement of plaintiff's due care.

We think the trial court properly refused defendant's instruction No. 3. It is presumptuous. It disregards the evidence of plaintiff's status at the time of the accident. In T. H. I. & E. Ry. Co. v. Kimmer, 114 Ill. 79; and C. & E. I. R. R. Co. v. Heath, 55 Ill. App. 249, the instruction was justified on the evidence presented. Instruction No. 4 was properly refused. Without stating the hearing of the Village ordinance on this case, it was confusing. The same is true of refused instruction No. 6. There was no contention by anyone that plaintiff was a licensee. Defendant's position was that he was a trespasser. Plaintiff's that he was an invitee. In any event given instruction No. 13 protected defendant on the point.

We are unable to see any cause for complaint because of the trial court's refusal to withdraw a juror and continue the case at defendant's request for alleged prejudicial conduct of plaintiff's mother. The court heard evidence on the motion. The record of the evidence is before us. We approve the court's ruling.

Finally, we see no merit in the contention that the verdict of $35,000 was excessive.

For the reasons given the judgment is affirmed.

JUDGMENT AFFIRMED.

LEWE, P.J. AND BURKE, J. CONCUR.

We are unable to see any error for complaint because of the trial court's refusal to withdraw a juror and continue the case at defendant's request for alleged improprietal conduct of plaintiff's counsel. The court heard evidence on the motion. The record of the evidence is before us. We approve the court's ruling.

Finally, we see no merit in the contention that the verdict of $25,000 was excessive.

For the reasons given the judgment is affirmed.

JUDGMENT AFFIRMED.

LEWIS, P.J. AND WEBER, J. CONCUR.

O.K. Fwd.

330 28 41

Abstract

A

Gen. No. 10055 Agenda No. 4.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A.D. 1945.

330 I.A. 230

HERMAN EICKSTEADT and WILLIAM FENZ, Appellee, vs. LOUIS A. COX and BESSIE M. COX, Appellant.	Appeal from Circuit Court, McHenry County.

WOLFE,-- P.J.

Herman Eicksteadt and William Fenz, real estate brokers, started a suit in the Circuit Court of McHenry County against Louis A. Cox and his wife, Bessie M. Cox, for $1500.00, which they claimed as a real estate commission in procuring a buyer for the Cox farm. A trial was had before the Court, without a jury. The Court found in favor of the plaintiffs and rendered judgment for $1500.00. It is from this judgment that the appeal is prosecuted to this Court.

It is claimed by the appellant that the complaint does not state a good cause of action, and therefore the judgment cannot be sustained. We find no merit in this contention.

It is also contended that the Court admitted improper

evidence, and that there is a variance in the allegations of the complaint, and the proof. The abstract, which consists very largely of questions and answers, as contained in the record, shows the case was hotly contested and a great many objections were made to the testimony. The Court very properly stated in his final analysis of the case, he considered only the evidence which was properly admitted. On appeal we will consider that this is the only evidence that he regarded in arriving at his conclusions. We are also convinced that there is no variance between the allegations of the complaint and the proof.

The issues are mainly one of fact. The record discloses that Mr. Eicksteadt had a conversation with the Coxes some time during the year 1942, relative to the sale of the farm. Negotiations between them continued during that year and the year 1943. At one time Mr. Eicksteadt had a written contract for the exclusive sale of the farm at $200.00 per acre. This contract expired by its own terms within ten days of its date, and no sale was made. Mr. Eicksteadt had been doing business with another real estate broker, William Fenz, and interested him in the sale of this place. Mr. Fenz took different parties to see the farm, and had several conversations with the Coxes relative to the same. Finally Mr. Fenz took Louis Barkei to see the farm, and interested him in the purchase of the same. During the latter part of December 1943, Mr. Fenz went to the Coxes and submitted a proposition to them that Mr. Barkei would pay $30,000.00 for the farm, $3,000.00 cash and the balance of $27,000.00 on the first day of Jan. 1944. The Coxes were to remain on the farm, rent free, until March

1, 1945. Barkei was to pay the taxes and insurance on the farm. Barkei, Fenz and Eicksteadt all testify that the Coxes accepted this offer and that Fenz was to have a written contract drawn, and present it for the Coxes' signature some time after the first of Jan. 1944, because they did not want the capital gain on the sale of the farm to be included in their 1943, income tax. The Coxes denied that they ever accepted the offer. They claim they told the plaintiffs and Barkei that they would have to wait and see how much the income tax would be.

It is a well established rule of law that where a case is tried before a Court without a jury, or with a jury, when properly instructed, their findings should be conclusive, unless a Court of review, from an examination of the evidence, decides that their finding is contrary to the manifest weight of the evidence. The decision of the trial court is contained in the abstract, part of which is as follows: "The Court couldn't help but note the fact that the defendants in giving their testimony, were in almost every instance, very vague in regard to what was said and done at the various meetings of the parties. It was only when some little incident or bit of conversation might have adversely affected them that they became precise or positive in their version regarding the same." The Court also comments upon the fact that the testimony of the plaintiffs and Barkei was concise, and he believed their story to be true. From our reading of the record, we have come to the same conclusion as the trial court, and that the plaintiffs have established their case by a clear preponderance of the evidence. The judgment of the trial court should be affirmed.

Judgment affirmed.

No. 10114 Agenda No. 18

Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

October Term, A. D. 1946

RALPH R. BRADLEY, Plaintiff-Appellee	)	Appeal from Circuit Court, Lake County
vs	)	
SHORE LINE YELLOW CAB COMPANY, a Corporation, Defendant-Appellant.	)	

330 I.A. 330

Bristow, J.

This is an appeal from the Circuit Court of Lake County where the appellant was a defendant in a forcible detainer action, and, wherein, the appellee sought possession of certain premises being occupied by appellant in Highland Park, Illinois. There was a jury trial, and at the close of all the evidence the Circuit Court granted appellee's motion for a directed verdict and entered judgment thereon, giving possession of the premises in question to appellee.

Appellant contends here that the trial court erred in determining that there was no issue of fact to be submitted to the jury, and furthermore, that it erred in holding the "60 day notice" was sufficient. Giving consideration to these contentions, let us briefly review the evidence adduced on the trial: Phillip M. Carnes, a witness called by appellee, testified that he was employed by the lessor, and that he served a notice to terminate the tenancy in question on February 12, 1946, which notice called upon the Shore Line Yellow Cab Company to vacate on the 17th day of April, 1946. Carnes further testified that he remembered the date upon which the notice was served because he made a memorandum or notation upon a letter which read as follows: "Both notices served on lessees personally 2PM February 12/46 P.M.C." Appellant argues that the record shows that this memorandum upon which Carnes relied to refresh his recollection

No. 10114 Agenda No. 18

Affirmed.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

October Term, A. D. 1946

RALPH H. DOBELLI, Plaintiff-Appellee, vs. SHORE LINE YELLOW CAB COMPANY, a Corporation, Defendant-Appellant.	Appeal from Circuit Court, Lake County

Bristow, J.

This is an appeal from the Circuit Court of Lake County where the appellant was a defendant in a Forcible Detainer action, and, whereby, the appellee sought possession of certain premises being occupied by appellant in Highland Park, Illinois. There was a jury trial, and at the close of all the evidence the Circuit Court granted appellee's motion for a directed verdict and entered judgment thereon, giving possession of the premises in question to appellee.

Appellant contends here that the trial court erred in determining that there was no issue of fact to be submitted to the jury, and furthermore, that it erred in holding the "30 day notice" was sufficient. Giving consideration to these contentions, let us briefly review the evidence adduced on the trial: Phillip H. Dimmes, a witness called by appellee, testified that he was employed by the lessor, and that he served a notice to terminate the tenancy in question on February 12, 1945, which notice called upon the Shore Line Yellow Cab Company to vacate on the 12th day of April, 1946. Dimmes further testified that he remembered the date upon which the notice was served because he made a memorandum of notation upon a letter which read as follows: "Both notices served on lessee personally 2&3 February 12\46 P.M." Appellant argues that the record shows that this memorandum upon which Dimmes relied to refresh his recollection

was written upon a letter dated February 26, 1946; and, that this being true, it was impossible for him to have made the entry at the time he said he made it, namely, immediately after serving the notices on February 12. However, the record plainly shows that the notation was made on a letter from an attorney by the name of C. H. Jones, bearing the date of February 11, 1946, which letter was marked Plaintiff's Exhibit 5.

Appellant further argues that the notice served upon appellee was defective, and, consequently, appellant's motion for a directed verdict at the close of plaintiff's case should have been allowed. The nature of appellant's contention can be made clear by quoting from his brief: "Defendant's rent was due on the first day of each month. Having paid its rent for the month of February, its possession fro that month, could not be affected or distrubed. Rent for the month of April, 1946 was due on April 1st, and when paid would have entitled defendant to remain for the entire month of April. We cannot conceive how a tenant whose rent is by the month, can be required to pay its rent for a period and still be required to vacate before that period is up. There was no provision in the lease, and we know of none in law which makes rent apportionable." It was his theory, therefore, that the tenant could not have been required to vacate before April 30, 1946. This argument is not valid, and cases cited in support thereof are not in point because the written lease in this case provided that the landlord could do exactly what he did do. The provision applicable reads as follows: "It is expressly agreed that this lease may be terminated at any time during its term by the lessor upon sixty days written notice to lessee." The following language employed by the Court in the case of Frederick W. B. May v Freeman Rice, 108 Mass. 150, appropriately considers this question and disposes of same adversely to appellant's claim ~~which is as follows~~. "The Court, referring to the oral extension said, 'This agreement undoubtedly created a tenancy at will commenc-

was written upon a letter dated February 26, 1946; and, that this being true, it was impossible for him to have made the entry at the time he said he made it, namely, immediately after serving the notices on February 12. However, the record plainly shows that the notation was made on a letter from an attorney by the name of C. H. Jones, bearing the date of February 11, 1946, which letter was marked Plaintiff's Exhibit 5.

Appellant further argues that the notice served upon appellee was defective, and, consequently, appellant's motion for a directed verdict at the close of plaintiff's case should have been allowed. The nature of appellant's contention can be made clear by quoting from his brief: "Defendant's rent was due on the first day of each month. Having paid its rent for the month of February, its possession for that month, could not be affected or disturbed. Rent for the month of April, 1946 was due on April 1st, and when paid would have entitled defendant to remain for the entire month of April. We cannot conceive how a tenant whose rent is by the month, can be required to pay its rent for a period and still be required to vacate before that period is up. There was no covenant in the lease, and we know of none in law which makes rent apportionable." It was his theory, therefore, that the tenant could not have been required to vacate before April 30, 1946. This argument is not valid, and cases cited in support thereof are not in point because the written lease in this case provided that the landlord could do exactly what he did do. The provision applicable reads as follows: "It is expressly agreed that this lease may be terminated at any time during its term by the lessor upon sixty days written notice to lessee." The following language employed by the Court in the case of Frederick W. E. May v. Freeman Bros. 108 Mass. 150, appropriately considers this question and disposes of same adversely to appellant's claim which is as follows. "The Court, referring to the oral extension said, 'This agreement undoubtedly contained a tenancy at will commence-

ing June 6, 1869. But a tenancy at will may be terminated not only in the manner provided by the statute, but at any time and in any mode mutually agreed upon by the parties. As the parties in this case have entered into a contract as to the time and mode of terminating the tenancy their rights are to be determined by the fair construction of that contract, and not by the technical rules which apply to the termination of a tenancy at will where there is no contract on the subject. The stipulation between the parties was 'that either party might terminate the tenancy by giving one month's notice to the other in writing.' By the natural import of this language we think that either party may give written notice to the other at any time, and the tenancy be terminated at the expiration of one month therefrom. There is no provision in the contract that the month's notice shall expire at the end of a quarter, or of a calendar month; and we ought not to introduce into court, by implication, such stipulation, unless it clearly appears from the whole contract that such was the intention of the parties."

On behalf of the appellant, there was called as a witness a Mr. Frank Ketter, President of the Yellow Cab Company, the person on whom the notice to quit was allegedly served. On the trial of this cause before the Justice of the Peace, he had apparently testified that he did not remember when the notice was served. On the trial before the Circuit Court, he said that to the best of his recollection the date of the service was around about February 18. On cross examination, he testified that he did not remember just when he was served or what was his testimony on the former trial. In view of the equivocal and uncertain character of Ketter's testimony, we believe that the trial court was fully justified in concluding that there was a proper notice to terminate the tenancy, and that there was no issue of fact to be presented to the jury.

We do feel, however, that there is merit to the complaint made by the appellant that the trial court was in error in limiting their cross examination of witness Carnes. Carnes was asked on cross examination, if, when he served the notice on Ketter, he did not have

ing June 8, 1969. But a tenancy at will may be terminated not only in the manner provided by the statute, but at any time and in any mode mutually agreed upon by the parties. As the parties in this case have entered into a contract as to the time and mode of terminating the tenancy their rights are to be determined by the fair construction of that contract, and not by the technical rules which govern the termination of a tenancy at will where there is no contract on the subject. "An stipulation between the parties was 'that either party might terminate the tenancy by giving one month's notice to the other in writing.' By the natural import of this language we think that either party may give written notice to the other at any time, and the tenancy be terminated at the expiration of one month thereafter. There is no provision in the contract that the month's notice must expire at the end of a quarter, or of a calendar month; and we ought not to introduce into court, by implication, such stipulation, unless it clearly appears from the whole contract that such was the intention of the parties."

On behalf of the appellant, Thyra Ann Dallas, Mrs. Thomas A. Fr. Frank Estes, President of the Nation's Capital, the person on whom the notice to quit was allegedly served. On the trial of the cause before the District of the Peace, he had unequivocally testified that he did not remember when the notice was served. On the trial before the District Court, he said that to the best of his recollection the date of the service was around about February 14. On cross examination, he testified that he did not remember just when he was served or that was his testimony on the former trial. In view of the equivocal and uncertain character of Estes's testimony, we believe that the trial court was fully justified in concluding that there was a proper notice to terminate the tenancy, and that there was no issue of fact to be presented to the jury.

We do feel, however, that there is merit in the complaint made by the appellant that the trial court was in error in limiting their cross examination of witness Estes. Counsel yet undertook to cross examine, if, when he served the notice on Estes, he did not have

a conversation with Ketter wherein he, Carnes, admitted that there was not sixty days intervening between the date of service and April 17. Inasmuch as Carnes had testified on direct examination that he had served the notice in question on a date which was more than sixty days before April 17, it seems that it would have been proper to permit inquiry relative to this apparent inconsistency. The record discloses, however, that Ketter was asked by his own counsel if any such conversation took place, and his answer was "No." Consequently, any error committed by the Court was not harmful, and would not justify a reversal.

In view of the foregoing, we are of the opinion that the judgment entered herein should be affirmed.

JUDGMENT AFFIRMED.

a conversation with Ketter wherein he admitted that there was not sixty days intervening between the date of service and April 17. Inasmuch as Gerges had testified on direct examination that he had served the notice in question on a date which was more than sixty days before April 17, it seems that it would have been proper to permit inquiry relative to this apparent inconsistency. The record discloses, however, that Ketter was asked by his own counsel if any such conversation took place, and his answer was "No." Consequently, any error committed by the Court was not harmful, and would not justify a reversal.

In view of the foregoing, we are of the opinion that the judgment entered herein should be affirmed.

AFFIRMED.

43856

THOMAS HOLLIS WEAVER, a Minor, by CLOE WEAVER, his Mother and Next Friend, Appellee, v. A. A. SPRAGUE and BERNARD J. FALLON, Trustees of CHICAGO RAPID TRANSIT COMPANY, a Corporation, Defendants.	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.
BERNARD J. FALLON, as Sole Permanent Trustee of CHICAGO RAPID TRANSIT COMPANY, a Corporation, Appellant.	330 I.A. 331

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff, a minor, by his next friend, brought an action against the trustees of the Chicago Rapid Transit Company to recover for personal injuries sustained while he was in the act of boarding one of defendant's southbound passenger cars at the Bryn Mawr Station in Chicago. On the trial the jury returned a verdict in plaintiff's favor for $60,000. The court required a remittitur of $20,000 and entered judgment for $40,000. Defendant appeals.

The record discloses that about 11:27 o'clock on the night of November 27, 1944, plaintiff, Thomas Hollis Weaver, who was then about 20 years old and a sailor in the Navy, stationed on the Navy Pier, Chicago, in boarding one of defendant's southbound elevated trains, was thrown and injured, as a result of which his right leg was amputated at about the knee. In his amended complaint he alleged that he was in the exercise of all due care and caution for his own safety and that it was the duty of defendant to exercise the highest degree of care consistent with the practical operation of the train.

43868

TERESA MOLLIE HEAVEN, a minor, by GLEN HEAVEN, his mother and next friend, Appellee,	
v.	
A. A. ROTARY AND FOUNDRY CO. TRUSTEES OF CHICAGO RACIS ROTARY COMPANY, a corporation, Defendants.	Appeal from Superior Court of Cook County.
ROTARY CO. TRUSTEES OF CHICAGO RACIS ROTARY COMPANY, a corporation, Appellant.	

Mr. PRESIDING JUSTICE DELBERT delivered the opinion of the court.

Plaintiff, a minor, by his next friend, brought an action against the trustees of the defunct Racis Rotary Company to recover for personal injuries sustained while he was in the act of boarding one of defendant's automobile passenger cars at the Bryn Mawr station in Chicago. At the trial the jury returned a verdict in plaintiff's favor for $40,000. The court required a remittitur of $20,000 and entered judgment for $40,000. Defendant appeals.

The record discloses that about 11:30 o'clock on the night of November 7, 1941, plaintiff, Teresa Mollie Heaven, who was then about 10 years old and a junior in the Bryn Mawr Elementary School, in company with a boy friend, Glenn Hoffman, was proceeding along the Bryn Mawr platform of defendant's southbound elevated trains, was thrown and injured, as a result of which his right leg was amputated at about the knee. In his amended complaint he alleged that he was in the exercise of all due care and caution for his own safety and that it was the duty of defendant to exercise the highest degree of care consistent with the practical operation of the train.

The evidence is to the effect that plaintiff's home was in Alabama; that he had been inducted into the Naval Service in July, 1943, in that service had been sent to a number of different places in this country and had been located at the Navy Pier, Chicago, for about 6 months before he was injured. That for some time he had been calling on a young lady who lived in The Bellshore Apartments, about one-half block east of the Bryn Mawr "L" Station. That on the day he was injured he met the young lady as per arrangement in downtown Chicago and they went to her apartment where they had something to eat and about 11:15 o'clock of that evening, he left to return to the Navy Pier. That he went to the Bryn Mawr "L" Station, which is located about 5600 north in Chicago, paid his fare, ascended the stairs to the platform, located between the 4 tracks of the Elevated Railroad - the west 2 tracks being for southbound, and the 2 to the east, northbound traffic. The train consisted of 3 cars with a crew of 3 men; the motorman - the conductor, whose duties were tomopen and close the rear side door of the first car and the front side door of the second car and to signal the motorman after he had received the signal from the guard, whose duties were to operate similar doors, one located at the side and rear end of the second car and the other at the side and front of the third car.

Plaintiff's testimony is that just after he ascended the stairs and reached the platform a southbound train which he intended to board, had stopped to permit passengers to alight and to board the train; that he took a few steps towards the south, saw the rear side door of the first car open but the side door on the second car near the front end was closed; that he put his left foot into the door of the first car when the train started up, and the door closed on his foot; that he held on to the grab irons for a short distance, then something struck him in the back and he fell. He found that his right leg was badly

The evidence is to the effect that plaintiff's home was in Alabama; that he had been inducted into the Naval service in July, 1944, in that service had been sent to a number of different places in this country and had been located at the Navy Pier, Chicago, for about 3 months or was injured. That for some time he had been calling on a young lady who lived in the Hollywood Apartments, about two-thirds block east of the Sewn Beer "L" Station. That on the day he was injured he met the young lady as per arrangement in downtown Chicago and they went to her apartment where they had something to eat and about 11:15 o'clock of that evening, he left to return to the Navy Pier. That he went to the Sewn Beer "L" Station, which is located about 5800 north in Chicago, paid his fare, ascended the stairs to the platform, located between the 4 tracks of the Elevated Railroad - the west 2 tracks being for southbound, and the 2 to the east, northbound traffic. The train consisted of 3 cars with a crew of 3 men; the motorman - the conductor, whose duties were to open and close the rear side door of the first car and the front side door of the second car and to signal the motorman after he had received the signal from the guard, whose duties were to operate similar doors, one located at the side and rear end of the second car and the other at the side and front of the third car.

Plaintiff's testimony is that just after he ascended the stairs and reached the platform a southbound train came up intended to board, had stopped to permit passengers to alight and to board the train; that he took a few steps towards the south, saw the rear side door of the first car open out the side door on the second car near the front end was closed; that he put his left foot into the door of the first car when the train started up, and the door closed on his foot; that he held on to the grab iron for a short distance, then something struck him in the back and he fell. He found that his right leg was badly

injured somewhere below the knee; that he called for help and that some lady who lived in one of the apartments just east of the tracks heard his cries, called the fire department and he was removed to a hospital. He further testified that he called to the conductor whom he saw standing in the front end of the second car to open the door of the second car.

The conductor, called by defendant, testified that the train stopped at the Bryn Mawr Station; some passengers alighted and others boarded the train; that he heard someone shout, "saw someone running on the platform" but did not know that plaintiff was injured until he arrived at the end of his run which was 63rd and Stony Island avenue [a distance of about 15 miles.] There is other evidence in the record, some of which will be hereinafter referred to.

Counsel for defendant contends that "The court erred in refusing to direct a verdict for defendants and in denying defendants' motion for judgment notwithstanding the verdict." In support of this counsel say that "The plaintiff made two distinct and separate statements of the facts relating to the accident: one upon the witness stand upon the trial of the case; the other in a statement made in the Wesley Memorial Hospital in Chicago, on December 13, 1944, which was 16 days after the accident. Those two versions of the accident are in many substantial and vital respects directly conflicting and wholly irreconcilable." But counsel say that on the motion for a directed verdict or for judgment n. o. v. all the evidence tending to prove plaintiff's case, with all reasonable inferences that may be drawn therefrom, must be taken as true and therefore they limit their argument to the version given by plaintiff on the witness stand and that all of plaintiff's evidence fails to prove any charge of negligence against defendant or that plaintiff was in the exercise of ordinary care for his own safety.

We think this contention cannot be sustained. Plaintiff

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Counsel for defendant contends that "The court erred in refusing to direct a verdict for defendants and in denying defendants' motion for judgment notwithstanding the verdict." In support of this counsel say that "The plaintiff made two distinct and separate statements of the facts relating to the accident: one upon the witness stand upon the trial of the case; the other in a statement made in the Healey Memorial Hospital in Chicago, on December 13, 1944, which was 15 days after the accident. These two versions of the accident are in many substantial and vital respects directly conflicting and wholly irreconcilable." But counsel say that on the motion for a directed verdict or for judgment n. o. v. all the evidence tending to prove plaintiff's case, with all reasonable inferences that may be drawn therefrom, must be taken as true and therefore they limit their argument to the version given by plaintiff on the witness stand and that all of plaintiff's evidence fails to prove any charge of negligence against defendant or that plaintiff was in the exercise of ordinary care for his own safety.

We think this contention cannot be sustained. Plaintiff

testified that the train had just stopped; that he went to the rear door of the first car which was open, that he stepped into the car when it started up and was thrown and injured. We think it obvious that if this were all the evidence the trial court could do nothing, under the law, but deny defendant's motion for a directed verdict or for judgment n. o. v.

A further argument is made by counsel on this same point that since plaintiff "based his claim solely on the alleged relation of carrier and passenger, he could not recover except by proof of facts showing that said relationship existed at the time of the accident." This contention is admitted by counsel for plaintiff but it is their contention that the relation of passenger and carrier existed at the time plaintiff was injured.

In Davis v. So. Side Elevated R. R. Co., 215 Ill. App. 24, another division of this court held that where plaintiff, who traveled as a passenger on one of defendant's elevated trains, and after she alighted and was descending the stairway to the street below, slipped on a banana peel which lay on the stairway, she was still a passenger and the burden of rebutting the presumption of negligence rested upon defendant. On appeal to the Supreme court the judgment was reversed, 292 Ill. 378, where the court said: "The precise question does not seem to have been definitely decided by this court." And that "The decisions are not all in harmony, though the weight of authority seems to be that as to station buildings and other appurtenances only ordinary or reasonable care is required." The court then refers to and discusses a number of authorities, some of which hold that the highest degree of care is required on the part of railroads as to their stations, but pointed out that a greater degree of care was required by railroad companies

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when a person was boarding the train then when he was in the station for the purpose of taking the train, and overruled any former decision that seemed to support the contrary.

In Chicago & Eastern Ill. R. R. Co. v. Jennings, 190 Ill. 478, it was held that what facts will create the contract relation of carrier and passenger is a question of law and when the existence of such relation is in controversy it is the duty of the court to give a proper instruction, informing the jury what facts will be sufficient evidence of the contract. And speaking by Mr. Justice Cartwright the court said: "It is not necessary, to create the relation, that the passenger should have entered a train, but if he is at the place provided for passengers, such as the waiting room or platform at the station, with the intention of taking passage and has a ticket, he is entitled to all the rights and privileges of a passenger. A railroad company owes a general duty to receive and carry those who present themselves at the time and place provided for passengers requiring transportation. In Chicago and Alton Railroad Co. v. Wilson, 63 Ill. 167, Wilson, after purchasing a ticket for a train, was standing on a platform constructed by the railroad company for the convenience of passengers between the main track and a switch track. He was waiting for the passengers to alight from the train upon which he expected to take passage, when he was struck and injured by another train. The court regarded him as a passenger and held the company liable for the character of the platform."

In the case at bar, plaintiff testified that he was in the act of boarding the car when suddenly the door was closed and the train started. In these circumstances the relation of carrier and passenger prevailed and defendant was not relieved from this relationship by the fact(as its counsel contend) that the conductor rang the bell for the motorman to proceed. The

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motion of defendant for judgment notwithstanding the verdict was properly overruled.

Defendant further contends that "The court erred in refusing to grant defendants' motion for a new trial," for the reason that the judgment is against the manifest weight of the evidence. And that it is the duty of this court to consider the evidence when passing on this point. Obviously this is the well-settled law. Read v. Cummings, 324 Ill. App. 607.

In support of this contention counsel say that plaintiff testified that the door of the first car was completely open, while the conductor testified that he closed both doors completely at the same time and that after closing them he did not again open them before getting to the next station. That "Plaintiff and the conductor were the only witnesses who gave direct testimony upon this matter. Their testimony is in direct conflict and irreconcilable." Counsel say that it has been repeatedly held by this court and the Supreme court that where two witnesses "one testifying to a particular fact, and the other as completely denying such fact, no preponderance of the evidence is established." This is certainly not the law. Where different conclusions may reasonably be drawn from the evidence, the question is for the jury and after the verdict is returned and a motion for a new trial is made, it is the duty of the trial judge, in view of the verdict of the jury, to consider the preponderance of the evidence. If he enters judgment on the verdict and an appeal is then taken to this court, it requires much more for this court to disturb the verdict. Libby, McNeill & Libby v. Cook, 222 Ill. 206; Read v. Cummings, 324 Ill. App. 607; Turner v. Cummings, 319 Ill. App. 225.

On December 13, 1944, which was 16 days after plaintiff was injured, an investigator, accompanied by a young lady stenographer, went to the Wesley Hospital where plaintiff was being treated and interviewed him. The questions put to him and

motion of defendant for judgment notwithstanding the verdict was properly overruled.

Defendant further contends that "the court erred in refusing to grant defendants' motion for a new trial," for the reason that the judgment is against the manifest weight of the evidence. And that it is the duty of this court to consider the evidence upon passing on this point. Obviously this is the well-settled law. Ford v. Dunlap, 324 Ill. App. 207.

In support of this contention counsel say that plaintiff testified that the door of the first car was completely open, while the conductor testified that he closed both doors completely at the same time and that after closing them he did not stain open them before getting to the next station. That "Plaintiff and the conductor were the only witnesses who gave direct testimony upon this matter. Their testimony is in direct conflict and irreconcilable." Counsel say that it has been repeatedly held by this court and the Supreme court that where two witnesses "are testifying to a particular fact, and the other as completely denying such fact, no preponderance of the evidence is established." This is certainly entirely true. Where different conclusions may reasonably be drawn from the evidence, the question is for the jury and after the verdict is returned and a motion for a new trial is made, it is the duty of the trial judge, in view of the verdict of the jury, to consider the preponderance of the evidence. If he concurs, judgment on the verdict and an appeal is then taken to this court, it requires such work for this court to disturb the verdict. Illy, Scott & Illy v. Cook, 227 Ill. 208; Ford v. Dunlap, 324 Ill. App. 207; Turner v. Dunlap, 329 Ill. App. 224.

On December 15, 1944, which was 12 days after plaintiff was injured, an investigator, accompanied by a young lady stenographer, went to the Cooley Hospital where plaintiff was being treated and interviewed him. The questions put to him and

his answers, were taken down and afterwards written up and were introduced in evidence by defendant. They cover about 19 pages of the record, in which plaintiff, a number of times, says that the rear door of the first car and the front door of the second car were both closed when he attempted to board the train; that he thought the conductor would open the door - while in his testimony on the trial, as above referred to, he testified that the door on the first car was open and he stepped in with his left foot.

In reference to the answers made by him, as shown by the statement in evidence, plaintiff gave testimony to the effect that after the injuries and before he was interrogated, he had been given "shots" so that he could sleep, and other things were done by the physicians in charge so that he did not remember that he gave the statement to the investigator or that it was taken down in shorthand by the young lady.

We have considered all the evidence in the record and are of opinion that under the law, we would not be warranted in holding that the verdict of the jury in plaintiff's favor, sustained as it was by the trial judge, in overruling defendant's motion for a new trial, is against the manifest weight of the evidence.

Complaint is also made that the court erred in giving an instruction requested by plaintiff. The instruction is as follows: "The court instructs the jury if you believe from a preponderance of the evidence under the instructions of the court that Thomas Hollis Weaver, the plaintiff in this case, paid his fare and was in the act of boarding the train in question while the same was standing still with its door open, then you are instructed that he became and was a passenger for hire on the railroad operated by the defendant in this case." It is argued that this instruction is erroneous and prejudicial because it sets forth "four separate facts and instructs the jury that if they find those facts then the plaintiff became and was a passenger." We

his answers, were taken down and afterwards written up and were introduced in evidence by defendant. They cover about 12 pages of the record, in which plaintiff, a number of times, says that the rear door of the first car and the front door of the second car were both closed when he attempted to board the train; that he thought the conductor would open the door - while in his testimony on the trial, as above referred to, he testified that the door on the first car was open and he stepped in with his left foot.

In reference to the answers made by him, as shown by the statement in evidence, plaintiff gave testimony to the effect that after the injuries and before he was interrogated, he had been given "shots" so that he would sleep, and other things were done by the physicians in charge so that he did not remember that he gave the statement to the investigator or that it was taken down in shorthand by the young lady.

We have considered all the evidence in the record and the of opinion that under the law, we would not be warranted in disturbing that the verdict of the jury in plaintiff's favor, controlled as it was by the trial judge, in overruling defendant's motion for a new trial, is against the manifest weight of the evidence.

Complaint is also made that the court erred in giving an instruction requested by plaintiff. The instruction is as follows: "The court instructs the jury if you believe from a preponderance of the evidence under the instructions of the court that Thomas Hollis deceased, the plaintiff in this case, said his death was in the act of boarding the train in question while the same was standing still with the door open, then you are instructed that he became and was a passenger for hire on the railroad operated by the defendant in this case." It is argued that this instruction is erroneous and prejudicial because it gets forth "four separate facts and instructs the jury that if they find those facts then the plaintiff became and was a passenger." We

think there was no error in giving this instruction. Klinck v. Chicago Railway Company, 262 Ill. 280. Under this instruction the jury were required to find from a preponderance of the evidence that plaintiff was in the act of boarding the car, after paying his fare, and that the door on the car was open. And if they found those facts then plaintiff was a passenger for hire.

The judgment of the Superior court of Cook county is affirmed.

AFFIRMED.

Niemeyer and Feinberg, J.J., concur.

think there was no error in giving this instruction. Hirsch v. Chicago Railway Company, 238 Ill. 580. Under this instruction the jury were required to find from a preponderance of the evidence that plaintiff was in the act of boarding the car, after paying his fare, and that the door on the car was open. And if they found these facts then plaintiff was a passenger for hire.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

Niemeyer and Feinberg, J.J., concur.

43869

RUSSELL CURL, a Minor by ALFRED C. CURL, His Father and Next Friend, Appellee,	
v.	APPEAL FROM SUPERIOR COURT COOK COUNTY.
CITY OF CHICAGO, a Municipal Corporation, Appellant.	

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover damages for personal injuries which he claimed resulted when an abandoned building collapsed pinning him on the sidewalk. There was a jury trial and a verdict and judgment in plaintiff's favor for $10,000. Defendant appeals.

Russell Curl, a boy 11 years old, who will hereafter be referred to as plaintiff, on September 1, 1943, was severely injured at 2818 South Throop street, Chicago, when a building there collapsed over the sidewalk.

The record discloses that the building was an old one-story frame which came out flush with the sidewalk, in fact one of the wooden steps leading into the building was on the sidewalk. A year before plaintiff was injured an old lady who conducted a candy, ice cream and notion store in the building, passed away and thereafter the building remained vacant. For several months prior to the accident people in the neighborhood, including children, entered the building and took out joist and other pieces of wood. The building was 25 feet wide and about 50 feet deep. Along the building was a sidewalk about five feet wide. There is evidence to the effect that for many months prior to the time the building collapsed, police

RUSSELL GURL, a minor by ALFRED G. GURL, his father and next friend, Appellee,	
v.	
CITY OF CHICAGO, a municipal Corporation, Appellant.	

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover damages for personal injuries said to have resulted when an abandoned building collapsed falling into an alleyway. There was a jury trial and a verdict and judgment in plaintiff's favor for $10,000. Defendant appeals.

Russell Gurl, a boy 11 years old, who will hereafter be referred to as plaintiff, on September 1, 1944, was severely injured at 2815 South Throop street, Chicago, when a building there collapsed over the sidewalk.

The record discloses that the building was an old one-story frame which came out flush with the sidewalk. In fact one of the wooden steps leading into the building was on the sidewalk. A year before plaintiff was injured an old lady who conducted a candy, ice cream and notion store in the building, passed away and thereafter the building remained vacant. For several months prior to the accident people in the neighborhood, including children, entered the building and took out joist and other pieces of wood. The building was 25 feet wide and about 50 feet deep. Along the building was a sidewalk about five feet wide. There is evidence to the effect that for many months prior to the time the building collapsed, police

squads visited the premises and chased children away and other persons from time to time, saw children in there tearing out pieces of the building and chased them away. That the building leaned out over the sidewalk from a foot to a foot and a half for some time before it collapsed. There is further evidence to the effect that plaintiff, just prior to the accident, was in the building chopping at a pillar and post, attempting to take out some of the boards, that two men were on the top of the roof tearing it apart, and that as the building collapsed, the boy hurried out on to the sidewalk, when the building fell on him. There is further evidence in the record, but we think it unnecessary to refer to it here.

Defendant City contends that there is no evidence "that on the afternoon of September 1, 1943, the City had the requisite actual or constructive notice of the demolition of the building which caused its collapse." We think the evidence was sufficient to notify the City (whose police officers were passing the building for many days prior to the collapse and had chased children from it) that the building was leaning over the sidewalk in such condition that it might reasonably have been anticipated that it would collapse. The question of notice was for the jury and we think the verdict is sustained by the evidence.

Counsel for the City, in support of their contention that the City did not have actual or constructive notice of the delapidated condition of the building, cite and rely upon The Trust Co. of Chicago, etc. v. City of Chicago, 293 Ill. App. 636 (Abst.) and say it is on all fours with the case at bar. In that case suit was brought by the administrator tobrecover for the death of a 7 year old boy and damages for injuries were claimed by the next friend of a boy 15 years of age. At the close of plaintiff's case the court instructed the jury to find for the defendants. In that case there was a two-story frame building located on the rear of a lot on Normal avenue, adjacent

aquada visited the premises and chased children away and other persons from time to time, saw children in there tearing out pieces of the building and chased them away. That the building leaned out over the sidewalk from a foot to a foot and a half for some time before it collapsed. There is further evidence to the effect that plaintiff, just prior to the accident, was in the building chopping at a pillar and post, attempting to take out some of the boards, that two men were on the top of the roof tearing it apart, and that as the building collapsed, the boy hurried out on to the sidewalk, when the building fell on him. There is further evidence in the record, but we think it unnecessary to refer to it here.

Defendant City contends that there is no evidence "that on the afternoon of September 1, 1943, the City had the requisite actual or constructive notice of the demolition of the building which caused its collapse." We think the evidence was sufficient to notify the City (whose police officers were passing the building for many days prior to the collapse and had chased children from it) that the building was leaning over the sidewalk in such condition that it might reasonably have been anticipated that it would collapse. The question of notice was for the jury and we think the verdict is sustained by the evidence.

Counsel for the City, in support of their contention that the City did not have actual or constructive notice of the dilapidated condition of the building, cite and rely upon The Trust Co. of Chicago, etc. v. City of Chicago, 224 Ill. App. 656 (Abst.) and say it is on all fours with the case at bar. In that case suit was brought by the administrator to recover for the death of a 7 year old boy and damages for injuries were claimed by the next friend of a boy 15 years of age. At the close of plaintiff's case the court instructed the jury to find for the defendants. In that case there was a two-story frame building located on the rear of a lot on Normal avenue, adjacent

to the sidewalk and the boys were in the building when it collapsed. The building had been occupied by a tenant named Galloway and his family for three or four years, and "only a few days before the building collapsed" the Galloways vacated the premises. In the instant case the building had been in great disrepair for many months prior to the time it collapsed. The building had listed or leaned over the sidewalk for a considerable period of time before the plaintiff was injured.

Under the law it is the duty of the City to maintain its streets in a reasonably safe condition and if it fails to do so after notice, actual or constructive, it is liable to one who has sustained damages on account of such negligence. Village of Palestine v. Siler, 225 Ill. 630; Scarpaci v. City of Chicago, 329 Ill. App. 434. The latter case was decided by this court and the authorities discussed and applied.

The City further contends that the verdict and judgment are against the manifest weight of the evidence and cite The Trust Co. of Chicago v. City of Chicago, 293 Ill. App. 636 (Abst.) and other authorities. We think this contention cannot be sustained. The jury saw and heard the witnesses testify, they found in favor of plaintiff. The trial judge also saw and heard the witnesses testify; he entered judgment on the verdict. The judge and jury were in a much better position to determine the truth of the matter in controversy than are we, sitting in a court of review. In these circumstances we think we would not be warranted in disturbing the judgment.

A further contention is made that the trial court erred in refusing to submit to the jury special interrogatories requested by defendant. The two interrogatories were: "Was the plaintiff, Russell Curl, inside the building immediately prior to the time it collapsed and caused his injuries?" and: "Was the plaintiff, Russell Curl, in the act of leaving the collapsing

to the sidewalk and the boys were in the building when it collapsed. The building had been occupied by a tenant named Galloway and his family for three or four years, and "only a few days before the building collapsed" the Galloways vacated the premises. In the instant case the building had been in great dis-repair for many months prior to the time it collapsed. The building had listed or leaned over the sidewalk for a considerable period of time before the plaintiff was injured.

Under the law it is the duty of the City to maintain its streets in a reasonably safe condition and if it fails to do so after notice, actual or constructive, it is liable to one who has sustained damages on account of such negligence. Village of Palestine v. Miller, 223 Ill. 630; Sargent v. City of Chicago, 239 Ill. App. 454. The latter case was decided by this court and the authorities discussed and applied.

The City further contends that the verdict and judgment are against the manifest weight of the evidence and cite The Trust Co. of Chicago v. City of Chicago, 292 Ill. App. 588 (Abst.) and other authorities. We think this contention cannot be sustained. The jury saw and heard the witnesses testify, they found in favor of plaintiff. The trial judge also saw and heard the witnesses testify; he entered judgment on the verdict. The judge and jury were in a much better position to determine the truth of the matter in controversy than are we, sitting in a court of review. In these circumstances we think we would not be warranted in disturbing the judgment.

A further contention is made that the trial court erred in refusing to submit to the jury special interrogatories requested by defendant. The two interrogatories were: "Was the plaintiff, Russell Curl, inside the building immediately prior to the time it collapsed and caused his injuries?" and: "Was the plaintiff, Russell Curl, in the act of leaving the collapsing

building when he was injured?" In support of this, counsel say that "The answering of these special interrogatories by the jury would determine ultimate facts, which if inconsistent with the general verdict rendered by the jury would nullify the general verdict." Whether plaintiff was inside the building immediately prior to the time it collapsed or was in the act of leaving the collapsing building, if answered by the jury in the affirmative or negative, we think would in no way be inconsistent with the general verdict which was rendered.

Complaint is also made that the court erred in refusing to give an instruction requested by defendant setting forth its theory of the case. The offered instruction was that "the city is not liable for failure to remove an unsafe building or structure located on private property," etc. We think there was no error in refusing this instruction for the reason that the evidence all showed that the building was leaning out over the sidewalk for one or one and one-half feet, for a considerable time before it collapsed.

The judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Niemeyer, J., and Feinberg, J., concur.

building when he was injured?" In account of this, counsel say that "the assembly of these special findings tended to the jury would determine without force, which if inconsistent with the general verdict rendered by the jury would nullify the general verdict." Whether plaintiff was inside the building immediately prior to the time it collapsed or was in the act of leaving the collapsing building, it appeared by the jury in the affirmative or negative, we find such is in no way inconsistent with the general verdict which was rendered.

Appellant is also made that the court erred in refusing to give an instruction requested by defendant setting forth its theory of the case. The offered instruction was that "the city is not liable for failure to secure or remove building or structure located on private property," etc. We find there was no error in refusing this instruction for the reason that the evidence all showed that the building was leaning out over the sidewalk for one or two and one-half feet, for a considerable time before it collapsed.

The judgment of the superior court of Cook County is affirmed.

JUDGMENT AFFIRMED.

Sheeryer, J., and Fathony, J., concur.

43930

JOHN N. LA BELLE,
Appellee,

v.

VIRGINIA HILLSMAN and OTTO HILLSMAN,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

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3301.A.332

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

John N. La Belle brought an action against defendants to recover $295.54 on account of his automobile being struck by an automobile driven by defendant, Virginian Hillsman, and owned by her father, Otto Hillsman. Plaintiff also claimed $5 which he paid to a doctor to treat injuries received asca result of the collision between the two automobiles. Defendants filed their defense denying liability and Otto Hillsman, the owner of the automobile, filed a counterclaim for $312.36 for damages sustained by him to his automobile. The jury rendered a verdict finding defendants not guilty as to plaintiff's claim and finding plaintiff guilty on defendants' counterclaim for $312.36. Judgment was entered on the verdict. Plaintiff filed a motion for a new trial to vacate and set aside the judgment entered on the finding of "not guilty" in favor of the defendants and against plaintiff and also a motion to vacate and set aside the verdict and judgment entered in favor of Otto Hillsman notwithstanding the verdict. The court denied plaintiff's motion for a new trial but sustained his motion as to the counterclaim. Defendants appeal.

The record discloses that about 6 o'clock on the afternoon of April 3, 1945, plaintiff was driving his automobile east in Arthur avene, Chicago, and defendant, Virginia Hillsman, was

43920

JOHN N. LA BELLE,
Appellee,

v.

VIRGINIA HILLSMAN and OTTO HILLSMAN,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

John N. La Belle brought an action against defendants to recover $295.84 on account of his automobile being struck by an automobile driven by defendant, Virginia Hillsman, and owned by her father, Otto Hillsman. Plaintiff also claimed $5 which he paid to a doctor to treat injuries received as a result of the collision between the two automobiles. Defendants filed their defense denying liability and Otto Hillsman, the owner of the automobile, filed a counterclaim for $212.25 for damage sustained by him to his automobile. The jury returned a verdict finding defendants not guilty as to plaintiff's claim and finding plaintiff guilty on defendants' counterclaim for $212.25. Judgment was entered on the verdict. Plaintiff filed a motion for a new trial to vacate and set aside the judgment entered on the finding of "not guilty" in favor of the defendants and against plaintiff and also a motion to vacate and set aside the verdict and judgment entered in favor of Otto Hillsman notwithstanding the verdict. The court denied plaintiff's motion for a new trial but sustained his motion as to the counterclaim. Defendants appeal.

The record discloses that about 5 o'clock on the afternoon of April 3, 1945, plaintiff was driving his automobile east in Arthur avenue, Chicago, and defendant, Virginia Hillsman, was

driving her father's automobile north in Western avenue. The roadway of Arthur avenue is about 30 feet wide and that of Western avenue, about 60 feet wide. There are two lines of street car tracks in Western avenue. It had been raining and was misty at the time and the windshield wipers were being operated. As plaintiff's car reached about the east curb of Western avenue it was struck on the side by the front end of the northbound automobile. Both cars were damaged.

Plaintiff testified there was a stop sign on the south side of Arthur avenue just west of the roadway of Western avenue; that when he reached this sign he stopped, looked to the south to Devon avenue, an east and west street, and the first street south of Arthur avenue; that there were stop and go lights at that intersection and plaintiff testified he saw the green light for north and south traffic when he looked to his right, on Western avenue, but did not see the automobile driven by defendant, Virginia Hillsman. That there was no other traffic in the streets at the time. That there were safety islands where passengers boarded and alighted from street cars, one located south of Arthur avenue and east of the northbound street car track and the other north of Arthur avenue, west of the southbound street car track; that he did not see the northbound automobile until he was crossing the northbound street car track when it was two or three car lengths south of Arthur avenue; that the automobile was coming at a speed of from 30 to 40 miles an hour; that he was driving his automobile about 15 miles per hour; and that defendants' automobile struck his on the right or south side and both cars went over towards the northeast corner of the intersection.

Virginia Hillsman testified that she was anaaccountant and was driving her father's car north on Western avenue to their home which was some few blocks farther north of the place

driving her father's automobile north in Eastern avenue. The roadway of Arthur avenue is about 30 feet wide and that of Eastern avenue, about 60 feet wide. There are two lines of street car tracks in Eastern avenue. It had been raining and was misty at the time and the windshield wipers were being operated. As plaintiff's car reached about the east curb of Eastern avenue it was struck on the side by the front end of the northbound automobile. Both cars were damaged.

Plaintiff testified there was a stop sign on the south side of Arthur avenue just east of the roadway of Eastern avenue; that when he reached this sign he stopped, looked to the south to Devon avenue, an east and west street, and the first street south of Arthur avenue; that there was stop and go lights at that intersection and plaintiff testified he saw the green light for north and south traffic when he looked to his right, on Eastern avenue, but did not see the automobile driven by defendant, Virginia Hillman. That there was no other traffic in the streets at the time. That there were safety islands where passengers boarded and alighted from street cars, one located south of Arthur avenue and east of the northbound street car track and the other north of Arthur avenue, west of the south-bound street car track; that he did not see the northbound automobile until he was crossing the northbound street car track when it was two or three car lengths south of Arthur avenue; that the automobile was coming at a speed of from 30 to 40 miles an hour; that he was driving his automobile about 12 miles per hour; and that defendants' automobile struck his car on the right or south side and both cars went over towards the northeast corner of the intersection.

Virginia Hillman testified that she was accompanied and was driving her father's car north on Eastern avenue to their home which was some two blocks farther north of the place

of the accident; that she was traveling at a speed of about 25 miles an hour; that there was a southbound street car in Western avenue and that she did not see plaintiff's automobile until the street car had passed to the south when she was then about 1 or 2 car lengths south of Arthur avenue; that she applied her brakes but could not stop in time and the collision occurred. Plaintiff and Miss Hillsman were the only witnesses to the occurrence.

The evidence further shows that plaintiff paid $295.54 for the repair of his car and a $5 doctor bill for a slight injury he suffered and that defendant, Otto Hillsman, paid $307.36 for repairs to his car and $5 for having it towed away from the scene of the accident, making a total of $312.36. It was agreed that Virginia was acting as agent of her father at the time in question.

Defendants contend that the court erred in entering judgment notwithstanding the verdict in their favor; that the evidence tended to show that Virginia, in driving the automobile, was in the exercise of all due care and caution and that the collision occurred as a result of the negligence of plaintiff in driving his car east in Arthur avenue across the intersection.

We think there was evidence which tended to show that Virginia, in driving the car was guilty of negligence. There was also some evidence to the effect that plaintiff was guilty of negligence but the question whether the jury's verdict finding against plaintiff was against the manifest weight of the evidence is not before us. There is no argument made on this point. We are further of opinion that the court was wholly unwarranted in sustaining plaintiff's motion for judgment notwithstanding the verdict. The question was for the jury. Libby, McNeill & Libby v. Cook, 222 Ill. 206; Read v. Cummings, 324 Ill. App. 607.

In the Read case we said: "Where a motion is made by defendant at the close of all the evidence to direct a verdict,

of the accident; that she was travelling at a speed of about 25 miles an hour; that there was a southbound street car in Western avenue and that she did not see plaintiff's automobile until the street car had passed to the south when she saw them about 1 or 2 car lengths south of Arthur avenue; that she applied her brakes but could not stop in time and the collision occurred. Plaintiff and Miss Hillman were the only witnesses to the occurrence.

The evidence further shows that plaintiff paid $[illegible] for the repair of his car and a $5 doctor bill for a minor injury he suffered and that defendant, Otto Hillman, paid $[illegible].50 for repairs to his car and $5 for having it towed away from the scene of the accident, making a total of $[illegible]. It was agreed that Virginia was acting as agent of her father at the time in question.

Defendants contend that the court erred in entering judgment notwithstanding the verdict in their favor; that the evidence tended to show that Virginia, in driving the automobile, was in the exercise of all due care and caution and that the collision occurred as a result of the negligence of plaintiff in driving his car east in Arthur avenue across the intersection.

We think there was evidence which tended to show that Virginia, in driving the car was guilty of negligence. There was also some evidence to the effect that plaintiff was guilty of negligence but the question whether the jury's verdict finding against plaintiff was against the manifest weight of the evidence is not before us. There is no argument made on this point. We are further of opinion that the court was equally unwarranted in sustaining plaintiff's motion for judgment notwithstanding the verdict. The question was for the jury. Libby, McNeill & Libby v. Cook, 229 Ill. 206; Dean v. Gunsaulus, 224 Ill. App. 607.

In the Dean case we said: "Where a motion is made by defendant at the close of all the evidence to direct a verdict,

the court cannot weigh the evidence, but the evidence must be considered in the light most favorable to plaintiff and obviously such motion should then be denied if there is any evidence, more than a scintilla, that may be reasonably construed to prove plaintiff's case. Libby, McNeill & Libby v. Cook, 222 Ill. 206."

Since plaintiff makes no complaint that the court erred in not awarding him a new trial, the judgment of the Municipal court of Chicago is reversed and the cause remanded with directions to enter judgment on the verdict in defendants' favor.

REVERSED AND REMANDED WITH DIRECTIONS.

Niemeyer, J., and Beinberg, J., concur.

the court cannot weigh the evidence, but the evidence must be considered in the light most favorable to plaintiff and obviously such motion should then be denied if there is any evidence, more than a scintilla, that may be reasonably construed to prove plaintiff's case. Lyon, Inland & Lyon v. Jack, 222 Ill. 206."

Since plaintiff seeks to complain that the court erred in not awarding him a new trial, the judgment of the municipal court of Chicago is reversed and the cause remanded with directions to enter judgment on the verdict in accordance herewith.

REVERSED AND REMANDED WITH DIRECTIONS.

Hewerdy, J., and Fairbank, J., concur.

43872-73-74

330 I.A. 333

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, v. SAM WATTS, HAZEL SMITH and BERNICE POWELL, Plaintiffs in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Separate writs of error were sued out of this court by Sam Watts, Hazel Smith and Bernice Powell, to review convictions against them on separate complaints in the Municipal Court of Chicago. The cases have been consolidated for hearing in this court.

The original complaint against defendant Watts was for pandering and charged him, in apt language under the statute, with receiving part of the earnings of Maribel Nish from the practice by her of prostitution. The complaints against Smith and Powell charged each with being keepers of houses of prostitution. Each of the defendants, the record shows, though the abstract does not, were separately arraigned and pleaded not guilty to the complaints and waived jury trials. Upon a trial all defendants were found guilty. Watts was sentenced to serve a period of 6 months in the House of Correction and ordered to pay a fine of $300, and defendants Smith and Powell were each sentenced to serve a period of 60 days in the House of Correction. The finding and judgment of the lower court was entered on June 21, 1946.

On June 27, 1946, each defendant filed a petition to vacate the sentence and to grant a new trial, which petitions the court allowed and granted a new trial. The cases were set for a retrial on July 2. On that day, the record discloses, the

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	
v.	R. BOS TO MUNICIPAL COURT OF CHICAGO.
SAM WATTS, HAZEL SMITH and BERNICE POWELL, Plaintiffs in Error.	

MR. JUSTICE FARMER DELIVERED THE OPINION OF THE COURT:

Separate writs of error were sued out of this court by Sam Watts, Hazel Smith and Bernice Powell, to review convictions against them on separate complaints in the Municipal Court of Chicago. The cases have been consolidated for hearing in this court.

The original complaint against defendant Watts was for pandering and charged him, in set language under the statute, with receiving part of the earnings of Mattie Blair from the practice by her of prostitution. The complaints against Smith and Powell charged each with being keepers of houses of prostitution. Each of the defendants, the record shows, through the abstract does not, were separately arraigned and pleaded not guilty to the complaints and waived jury trials. Upon a trial all defendants were found guilty. Watts was sentenced to serve a period of 6 months in the House of Correction and ordered to pay a fine of $500, and defendants Smith and Powell were each sentenced to serve a period of 60 days in the House of Correction. The finding and judgment of the lower court was entered on June 21, 1946.

On June 27, 1946, each defendant filed a petition to vacate the sentence and to grant a new trial, which petitions the court allowed and granted a new trial. The cases were set for a retrial on July 2. On that day the record discloses, the

court heard evidence and again found each of said defendants guilty and re-imposed the same sentence upon each.

A bill of exceptions was ordered to be filed within 60 days. It appears from the record that an agreed statement of facts had been submitted to the court on September 20, 1946, which the trial judge approved and ordered filed nunc pro tunc as of July 26, 1946. We agree with defendant in error that the agreed statement of facts legally is no part of the record, since it was filed long after the statutory time fixed for the filing of the agreed statement of facts or report of proceedings, and after the time fixed by the order of the court on July 2, 1946. There is no showing in the record to justify the nunc pro tunc order, ~~Such an order~~, entered after the expiration of time to file the agreed statement of facts or report of proceedings, is void. People v. Nowak, 386 Ill. 130; People v. Keller, 353 Ill. 411. Since there is no proper report of proceedings or bill of exceptions, which would preserve the evidence for consideration by this court, there is nothing remaining for this court to review under the assignments of error. People v. Duvall, 379 Ill. 535.

The judgment in each of the consolidated cases is affirmed.

AFFIRMED.

O'Connor, P. J., and Niemeyer, J., concur.

court heard evidence and again found each of said defendants guilty and re-imposed the same sentence upon each.

A bill of exceptions was ordered to be filed within 30 days. It appears from the record that an agreed statement of facts had been submitted to the court on September 20, 1946, which the trial judge approved and ordered filed nunc pro tunc as of July 27, 1946. In error with defendant in error that the agreed statement of facts legally is no part of the record, since it was filed long after the statutory time for the filing of the agreed statement of facts or report of proceedings, and after the time fixed by the order of the court on July 2, 1946. There is no a being in the record to justify the nunc pro tunc order. Such an order, entered after the expiration of time to file the agreed statement of facts or report of proceedings, is void. People v. Tyler, 386 Ill. 100; People v. Hilton, 387 Ill. 411. Since there is no proper record of proceedings or bill of exceptions, which could preserve the evidence for consideration by this court, there is nothing remaining for this court to review under the assignments of error. People v. Duvall, 390 Ill. 366.

The judgment in each of the consolidated cases is affirmed.

Affirmed.

O'Connor, P. J., and Niemeyer, J., concur.

43894

330 I.A. 333

FRANCESCO D'ORANZO, Appellant,	
v.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
MITCHELL LACNY, Appellee.	

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant for personal injuries. A trial with a jury resulted in a verdict of not guilty. Motions for a new trial and arrest of judgment were overruled, and judgment for defendant was entered. Plaintiff appeals.

The theory of plaintiff was that he crossed the intersection of Ashland Avenue and Harrison Street in Chicago at the southeast corner, going west on the crosswalk; that the traffic lights were with him, and that defendant drove his automobile south through the red traffic light, struck plaintiff and injured him. Defendant claims that when he drove his automobile across Harrison Street at the intersection of Ashland Avenue, the lights were with him; that it was raining, and the windshield wipers on the windshield of his car were in good working order; and that plaintiff did not cross the intersection at Harrison and Ashland but dashed across the street, from the east to the west, several doors south of Harrison Street at a place fixed at 608 South Ashland Avenue, without looking for approaching vehicles; that defendant did not see plaintiff until the car was almost upon him and too late to stop the car. A passenger in defendant's car testified substantially as did the defendant as to the circumstances of the accident.

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FRANCESCO D'ORANZO, Appellant,	
v.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
MITCHELL LACNY, Appellee.	

MR. JUSTICE FRINCKE DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant for personal injuries. A trial with a jury resulted in a verdict of not guilty. Motions for a new trial and arrest of judgment were overruled, and judgment for defendant was entered. Plaintiff appeals.

The theory of plaintiff was that he crossed the intersection of Ashland Avenue and Harrison Street in Chicago at the southeast corner, going west on the crosswalk; that the traffic lights were with him, and that defendant drove his automobile south through the red traffic light, struck plaintiff and injured him. Defendant claims that when he drove his automobile across Harrison Street at the intersection of Ashland Avenue, the lights were with him; that it was raining, and the windshield wipers on the windshield of his car were in good working order; and that plaintiff did not cross the intersection at Harrison and Ashland but dashed across the street, from the east to the west, several doors south of Harrison Street at a place fixed at 608 South Ashland Avenue, without looking for approaching vehicles; that defendant did not see plaintiff until the car was almost upon him and too late to stop the car. A passenger in defendant's car testified substantially as did the defendant as to the circumstances of the accident.

There was a sharp conflict in the evidence, and the principal error relied upon for a reversal of the judgment is the admission of a police report made by two police officers, who appeared upon the scene within a half hour after the accident, and who interviewed the plaintiff and defendant in the hospital in the first aid room. They took the statements of plaintiff and defendant and reduced them to writing. This police report showed on its face that plaintiff crossed Ashland Avenue at a place in front of 608 South Ashland Avenue. Upon the offer of the police report in evidence, to which plaintiff objected, defendant's counsel stated: "Your Honor, if there is an objection you can't permit it to go in". The court allowed the report in evidence.

The two police officers testified as to the statement made by the plaintiff, as well as the defendant in the presence of plaintiff at the hospital, and that the report refreshed their recollection as to what was said. One of the officers claimed to have an independent recollection of the statement made by plaintiff and defendant. The other officer said he did not have an independent recollection but that the statement refreshed his recollection.

Under such circumstances, the police report received in evidence was clearly inadmissible. It was not used for the purpose of impeachment of plaintiff since plaintiff was not, upon cross-examination, questioned for the purpose of laying the foundation for impeachment.

Where a witness can testify that a report or document, made by him at the time of the occurrence, refreshes his recollection, the document or report may only be used for that purpose and is not otherwise admissible in evidence. Village of Broadview v. Dianish, 335 Ill. 299; People v. Zalimas, 319 Ill. 186.

There was a sharp conflict in the evidence, and the principal error relied upon for a reversal of the judgment is the admission of a police report made by two police officers, who appeared upon the scene within a half hour after the accident, and who interviewed the plaintiff and defendant in the hospital in the first aid room. They took the statements of plaintiff and defendant and reduced them to writing. This police report showed on its face that plaintiff crossed Ashland Avenue at a place in front of 608 South Ashland Avenue. Upon the offer of the police report in evidence, to which plaintiff objected, defendant's counsel stated: "Your Honor, if there is an objection you can't permit it to go in". The court allowed the report in evidence.

The two police officers testified as to the statement made by the plaintiff, as well as the defendant in the presence of plaintiff at the hospital, and that the report refreshed their recollection as to what was said. One of the officers claimed to have an independent recollection of the statement made by plaintiff and defendant. The other officer said he did not have an independent recollection but that the statement refreshed his recollection.

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Where a witness can testify that a report or document, made by him at the time of the occurrence, refreshes his recollection, the document or report may only be used for that purpose and is not otherwise admissible in evidence. Village of Broadview v. Dimmick, 355 Ill. 239; People v. Zaitzes, 319 Ill. 186.

In Koch v. Pearson, 219 Ill. App. 468, at p. 476, this court quoted with approval from 2 Elliott on Evidence, §872:

> "If the witness, after referring to the memorandum, is able to recollect the fact recorded, that is, if his memory is revived so that he remembers the facts, and can testify to it independently of the memorandum, then the memorandum is not admissible in evidence, unless it is admissible for some other purpose under some other rule. * * *."

This is the case strongly relied upon by defendant to justify the admission of the report in evidence in the instant case. In the case last cited the police report was held admissible in evidence. The reason for the ruling was that the police officer testified that even after looking at the report it did not refresh his recollection, but that he knew the report was true and truly recorded the statement secured by him from the drivers of the cars involved in that accident. That holding does not apply to the instant case.

In view of the necessity for another trial in this case, we shall not discuss the evidence nor indicate any judgment as to whether the proof shows negligence on the part of defendant or contributory negligence on the part of plaintiff.

The judgment of the Superior Court is reversed and the cause is remanded for further proceedings in conformity with the views herein expressed.

REVERSED AND REMANDED.

O'Connor, P. J., and Niemeyer, J., concur.

In Koch v. Peterson, 216 Ill. App. 468, at p. 472, this court quoted with approval from 2 Wigmore on Evidence, 1272:

> "If the witness, after referring to the memorandum, is able to recollect the fact recorded, that is, if his memory is revived so that he remembers the facts, and can testify to it independently of the memorandum, then the memorandum is not admissible in evidence, unless it is admissible for some other purpose under some other rule. * * *."

This is the case already relied upon by defendant to justify the admission of the report in evidence in the instant case. In the case last cited the police report was held admissible in evidence. The reason for the ruling was that the police officer testified that even after looking at the report it did not refresh his recollection, but that he knew the report was true and truly recorded the statement received by him from the drivers of the cars involved in that accident. That holding does not apply to the instant case.

In view of the necessity for another trial in this case, we shall not discuss the evidence nor indicate our judgment as to whether the proof shows negligence on the part of defendant or contributory negligence on the part of plaintiff.

The judgment of the Superior Court is reversed and the cause is remanded for further proceedings in conformity with the views herein expressed.

REVERSED AND REMANDED.

O'Connor, P. J., and Niemeyer, J., concur.

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ISADORE JOSEPHSON, Appellant, v. JOSEPH M. RUBENSTEIN, et al., Appellees.	APPEAL FROM SUPERIOR COURT COOK COUNTY.

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a decree awarding him $5,512.17 on an accounting had under the provisions of a consent decree.

In his complaint plaintiff alleged that he and the defendants Joseph M. and Samuel Rubenstein, as partners under the name of Josephson & Company, were engaged in watch repairing for the jewelry trade, and in the sale of jewelry and novelties in concessions in Goldblatt Bros. Inc., department stores under an agreement whereby he was to devote his entire time, skill and energy to the operation, management and conduct of the business of the partnership, and to receive 50 per cent of the profits; and each of the other partners was to devote only a portion of his time to the affairs of the partnership and receive 25 per cent of the profits; that the defendant Rubenstein Bros. Jewelry Company was an Illinois corporation; that all of its capital stock was owned and controlled by the Rubensteins, who had agreed to cause the corporation to sell all jewelry items and novelties to the partnership upon credit at cost to the corporation, plus 10 per cent to cover the expense to the corporation for overhead and handling charges; that all moneys of the partnership were deposited to the credit of the corporation, and all books of account, records, etc., were kept by the corporation; that the charges made for merchandise sold the partnership were arbitrary and in excess

ISADORE LOEBRECKON,
Appellant,

v.

JOSEPH M. RUBENSTEIN, et al.,
Appellees.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY.

MR. JUSTICE MINGEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a decree awarding him $6,812.17 on an accounting had under the provisions of a consent decree.

In his complaint plaintiff alleged that he and the defendants Joseph M. and Samuel Rubenstein, as partners under the name of Joseph & Company, were engaged in watch repairing for the jewelry trade, and in the sale of jewelry and novelties in concessions in Goldblatt Bros. Inc., department stores under an agreement whereby he was to devote his entire time, skill and energy to the operation, management and conduct of the business of the partnership, and to receive 50 per cent of the profits; and each of the other partners was to devote only a portion of his time to the affairs of the partnership and receive 25 per cent of the profits; that the defendant Rubenstein Bros. Jewelry Company was an Illinois corporation; that all of its capital stock was owned and controlled by the Rubensteins, who had agreed to cause the corporation to sell all jewelry items and novelties to the partnership upon credit at cost to the corporation, plus 10 per cent to cover the expense to the corporation for overhead and handling charges; that all moneys of the partnership were deposited to the credit of the corporation, and all books of account, records, etc., were kept by the corporation; that the charges made for merchandise sold the partnership were arbitrary and in excess

of 10 per cent above cost, and that by reason thereof the Rubensteins and the corporation made large secret profits. Plaintiff asked an accounting and other relief.

Defendants answered denying the partnership and asserting that the corporation owned and operated the business conducted under the name of Josephson & Company, and that plaintiff was merely an employee of the corporation. In the course of the trial before the court, after examination of Joseph Rubenstein under section 60 of the Civil Practice Act and during the direct examination of the plaintiff, the parties, at the suggestion of the court, entered into a stipulation which was incorporated into a decree ordering, adjudging and decreeing, so far as is material here, that plaintiff is entitled to an accounting; that no partnership existed between the parties; that they had agreed that plaintiff was to receive a salary of $75 per week plus a bonus to be computed upon the basis of 50 per cent of the net profits derived from that portion of the business of the corporation operated as Josephson & Company, which included the watch repair work and the department operated for Goldblatt Brothers for the period commencing with the opening of Josephson & Co. (January 1, 1941), to August 23, 1943; that such profits be determined by an auditor appointed by the court in accordance with standard accounting practice; that the cost of materials used and all goods sold by Josephson & Company shall be the actual cost to the defendants plus 10 per cent; that the charge for goods manufactured or assembled on the premises of the corporation shall be the actual cost plus such amount as the auditor shall determine to be fair for supervision, allocation of rental, maintenance and other proper charges; that where no invoices or other satisfactory evidence is available to determine actual cost to the corporation, the auditor shall determine such cost as of the date of sale by the cost of

of 10 per cent above cost, and that by reason thereof the Rubenstein and the corporation made large secret profits. Plaintiff asked an accounting and other relief.

Defendants answered denying the partnership and asserting that the corporation owned and operated the business conducted under the name of Josephson & Company, and that plaintiff was merely an employee of the corporation. In the course of the trial before the court, after examination of Joseph Rubenstein under section 60 of the Civil Practice Act and during the direct examination of the plaintiff, the parties, at the suggestion of the court, entered into a stipulation which was incorporated into a decree ordering, adjudging and decreeing, so far as is material here, that plaintiff is entitled to an accounting; that no partnership existed between the parties; that they had agreed that plaintiff was to receive a salary of $75 per week plus a bonus to be computed upon the basis of 10 per cent of the net profits derived from that portion of the business of the corporation operated as Josephson & Company, which included the watch repair work and the merchandise operated for Goldblatt Brothers for the period commencing with the opening of Josephson & Co. (January 1, 1941), to August 30, 1944; that such profits be determined by an auditor appointed by the court in accordance with standard accounting practice; that the cost of materials used and all goods sold by Josephson & Company shall be the actual cost to the corporate plus 10 per cent; that the charge for goods manufactured or assembled on the premises of the corporation shall be the actual cost plus such amount as the auditor shall determine to be fair for supervision, allocation of rental, maintenance and other proper charges; that where no invoices or other satisfactory evidence is available to determine actual cost to the corporation, the auditor shall determine such cost as of the date of sale by the cost of

comparable items to other jewelry manufacturers or wholesalers; that the charge of the auditor shall be made to the corporation (Josephson & Company division), as of August 23, 1943.

An audit was made and report submitted by the auditor appointed by the court. Plaintiff and defendants filed objections. After a hearing in which evidence was heard and extended oral and written arguments were considered, a decree was entered overruling all objections to the audit (except the objection of the defendants relating to the salaries of Joseph and Samuel Rubenstein, hereafter considered), finding and decreeing that $5,512.17 was due to plaintiff, and dismissing the complaint as to the individual defendants. Plaintiff appealed. Defendants served notice of a cross-appeal, but abandoned it, as counsel say, "for the purpose of simplifying the issues."

The consent decree definitely and ultimately fixed the rights of the parties and is binding alike on each of them and on the trial court. Fineman v. Goldberg, 329 Ill. 507, 511; Lock v. Leslie, 248 Ill. App. 438,444. As said by plaintiff: "When the stipulation was entered into the so-called 'partnership agreement' ceased to exist or have any effect, and any other matters that the defendants may have had in mind are of no effect if they are not expressed in the stipulation." Similarly, any matters that plaintiff might have had in mind are of no effect unless preserved in the stipulation, which is the consent decree. In our consideration of the questions raised ~~on appeal~~ we are restricted to the terms of that decree.

Plaintiff's principal objection is that the audit was not "in accordance with standard accounting practice," and that defendants were guilty of fraud in keeping their accounts and records and in concealing certain records from the auditor. Plaintiff and the Rubensteins had had years of experience in the business in which Josephson & Company was engaged. It is

comparable lines to other jewelry manufacturers or wholesalers; that the charge of the auditor could be made to the corporation (Josephson & Company division), as of August 31, 1944.

An audit was made and report submitted by the auditor appointed by the court. Plaintiff and defendants filed objections. After a hearing in which evidence on behalf was presented oral and written arguments were considered, a referee had authority overruling all objections to the audit (except the objection of the defendants relating to the salaries of Joseph and Samuel Rubenstein, hereafter considered), finding and accepting that $3,212.17 was due to plaintiff, and dismissing the complaint as to the individual defendants. Plaintiff appealed. Defendants argued action of a court-appeal, but abandoned it, as counsel say, "for the purpose of simplifying the issues."

The account decree correctly and adversely fixed the rights of the parties and is binding alike on each of them and on the trial court. Figueroa v. Kuhlmann, 201 Ill. 307, 311; Lock v. Leslie, 242 Ill. 400, 404. As said by plaintiff: "When the stipulation was entered into the so-called 'mandatory agreement' ceased to exist or have any effect, and any other matters that the defendants may have had in mind are of no effect if they are not expressed in the stipulation." Similarly, any matters that plaintiff might have had in mind are of no effect unless preserved in the stipulation, which is the account decree. In our consideration of the questions raised on appeal we are restricted to the terms of that decree.

Plaintiff's principal objection is that the audit was not "in accordance with standard accounting practice," and that defendants were guilty of fraud in keeping their accounts and records and in concealing certain records from the auditor. Plaintiff and the Rubenstein's had had years of experience in the business in which Josephson & Company was engaged. It is

undisputed that plaintiff had charge of the watch repair division of the business. The claim of plaintiff that he had supervision of the jewelry and novelty sales and the jewelry repair division is controverted. The jewelry repair items ranged from 10¢ up to $75, in one instance, or, according to plaintiff, from 75¢ up to $3 or $5 a job. The audit shows about 20,000 items, averaging about $1.34. Plaintiff estimates the watch repair business at about 80 per cent of the entire business of Josephson & Company (which totaled $383,940.94 for the period), and says that the average cost of watch repair jobs to the customer was $3.50; that on these charges the labor and material would run about half. Plaintiff did not keep cost records in the watch repair division, of which he had complete control, and no such records were kept by his predecessor. There is evidence that there was no custom in the business to keep cost records, the cost of such records being prohibitive. The clerk in the store fixed the price to be charged the customer, and one-half of this amount was charged to labor and material. Plaintiff accepts the principle as to watch repairs but objects to it when applied to jewelry repairs. His position is untenable. The total credit given to the corporation for merchandise by the auditor is $45,463.80, after deducting $17,899.16 as an estimated overcharge in the charges appearing on the corporation's books. This overcharge is the result of a test or spot checking by the auditor and applying percentages of overcharge shown by the test to the remaining merchandise. Plaintiff objects that the method adopted is not in accordance with standard accounting practice. The auditor testified that it was standard practice. Plaintiff produced an auditor who had made a partial audit of defendants' books prior to the entry of the consent decree, who testified that the method adopted by the court auditor was not in accord with the decree - a question to be decided by the

undisputed that plaintiff had charge of the watch repair division of the business. The claim of plaintiff that he had supervision of the jewelry and novelty sales and the jewelry repair division is controverted. The jewelry repair items ranged from 10¢ up to $75, in one instance, or, according to plaintiff, from 75¢ up to $3 or $5 a job. The total sales about 20,000 items, averaging about $1.54. Plaintiff estimates the watch repair business at about 80 per cent of the entire business of Joseph & Company (which totaled $88,040.44 for the period), and says that the average cost of watch repair jobs to the customer was $2.00; that on these charges the labor and material would run about half. Plaintiff did not keep cost records in the watch repair division, of which he had complete control, and no such records were kept by his predecessor. There is evidence that there was no custom in the business to keep cost records, the cost of such records being prohibitive. The clerk in the store fixed the price to be charged the customer, and one-half of this amount was charged to labor and material. Plaintiff accepts the principle as to which results not objects to it when applied to jewelry repairs. The contention is untenable. The total credit given to the corporation for overcharges by the auditor is $45,455.80, after deducting $17,555.10 as an estimated overcharge in the charges appearing on the corporation's books. This overcharge is the result of a test or cost checking by the auditor and no lying percentages of overcharge shown by the test to the remaining 24 checkings. Plaintiff objects that the method adopted is not in accordance with standard accounting practice. The auditor testified that it was standard practice. Plaintiff produced an auditor who had made a partial audit of defendants' books prior to the entry of the consent decree, who testified that the method adopted by the court auditor was not in accord with the decree - a question to be decided by the

court and not by a witness. Moreover, the court's auditor testified, and the court expressly found that about a month after the consent decree a conference was held between the court, the attorneys for the parties and the auditor in which it was agreed that the auditor should use his own judgment as to standard audit practice in making his audit. He also testified that the work of checking every single purchase was very time-consuming and very costly, and that instead of checking every month, he took every other month, getting a percentage of overcharges on the items they could find and using that as to months not checked. There is no competent evidence contradicting this testimony.

Although charging fraud in keeping the books, records, etc., plaintiff produced no evidence to support his charge. The court's auditor testified that the overcharge which he found was due to the defendants using the "Lifo Method" (last in first out) instead of the "Fifo Method" (first in first out), which the auditor adopted and which was more favorable to plaintiff because the transactions occurred during periods of rising prices. It is significant that when the head of the auditing firm employed by plaintiff was being cross-examined and was asked, "Can you point to any one thing or any single entry in the books or records of this defendant that is fraudulent," plaintiff objected on the ground that the witness was not competent to do it. This objection was made although the witness had personally spent 25 or 30 hours in examination of the books and had supervised and had access to the work of his employee who had spent several weeks on the job.

Plaintiff further charges that the defendants fraudulently concealed certain books and records from the court's auditor, thereby making an audit in accordance with standard practice impossible. This charge relates almost wholly to permanent

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Although charging fraud in keeping the books, records, etc., plaintiff produced no evidence to support his charge. The court's auditor testified that the overcharge which he found was due to the defendants using the "LIFO method" (last in first out) instead of the "FIFO method" (first in first out), which the auditor adopted and which was more favorable to plaintiff because the transactions occurred during periods of rising prices. It is significant that even the head of the auditing firm employed by plaintiff was before cross-examined and was asked, "Can you point to any one item or any single entry in the books or records of this defendant that is fraudulent," plaintiff objected on the ground that the witness was not competent to do it. This objection was made although the witness had personally spent 25 or 30 hours in examination of the books and had supervised and had access to the work of his employee who had spent several weeks on the job.

Plaintiff further charges that the defendants fraudulently concealed certain books and records from the court's auditors thereby making an audit in accordance with standard practice impossible. This charge relates almost wholly to permanent

inventory cards showing merchandise in the various concessions in the Goldblatt stores and the price of same. About half of the merchandise supplied the concessions was known as line merchandise, being merchandise which was given a line or stock number which was noted on the inventory cards with the price for each item. The remaining merchandise was purchased in lots consisting of a "whole group of merchandise of various kinds" - the invoice stating the price for the lot and not for the separate items or kinds of merchandise. In the conduct of the business the line merchandise, when sent to a concession, was entered on the inventory card with a line number and price. Until all the items on the card were disposed of the cards were kept in a current file in the merchandising room. When all items were sold the card would be put in a transferred or disposed-of file-a box containing about 1,000 cards. These were kept in the vault until about November, 1943, the time of the entry of the consent decree, when they were put in a storeroom on the same floor of the building as the merchandising room. When the auditor made his audit he was shown only the inventory cards in the current file in the merchandising room. Several months after plaintiff filed his objections to the auditor's report complaining of the absence of these cards, defendants in open court stated, "They were available for examination by the auditor." The auditor, after viewing these disposed-of files and making a test check which satisfied him that the cards were disposed-of inventory cards, testified that it would take one man several months to check each item, and the charge for his time alone would approximate $1,500. Plaintiff objected to a test check. Defendants insisted that the assets of Josephson & Company were not sufficient to meet the additional expense. The court refused to direct the auditor to make the detailed check unless provision was made for his compensation. Plaintiff rejected a proposal to charge the additiona cost to plaintiff if the result did not materially change the

inventory cards showing merchandise in the various compartments in the Goldblatt stores and the price of each. About half of the merchandise supplied the corporations was known as line merchandise, being merchandise which was given a line or stock number which was noted on the inventory cards with the price for each item. The remaining merchandise was purchased in lots consisting of a "sample group of merchandise of various kinds" - the invoice stating the price for the lot and not for the separate items or kinds of merchandise. In the product of the business the line merchandise, when sent to a concession, was entered on the inventory card with a line number and price. Until all the items on the card were disposed of the cards were kept in a current file in the merchandising room. When all items were sold the card would be put in a transferred or disposed-of file-a box containing about 1,000 cards. These were kept in the vault until about November, 1942, the time of the entry of the current decree, when they were put in a storeroom on the same floor of the building as the merchandising room. When the auditor made his audit he was shown only the inventory cards in the current file in the merchandising room. Several months after plaintiff filed his objections to the auditor's report complaining of the absence of these cards, defendants in open court stated, "They were available for examination by the auditor." The auditor, after viewing these disposed-of files and making a test check which satisfied him that the cards were disposed-of inventory cards, testified that it would take one man several months to check each item, and the charge for his time alone would approximate $1,500. Plaintiff objected to a test check. Defendants insisted that the assets of Jacobson & Company were not sufficient to meet the additional expense. The court refused to direct the auditor to make the detailed check unless provision was made for his compensation. Plaintiff rejected a proposal to charge the additional cost to plaintiff if the result did not materially change the

balance in his favor, and to the defendant if the test established overcharges materially greater than tests had previously shown. In view of the undisputed evidence that the overcharges discovered were due to a uniform method of fixing prices, and the finding of the court that the withholding of the disposed-of or transferred cards was not wilful or fraudulent, we cannot say that a detailed check should have been made.

In the beginning the parties agreed that Mr. Elbogan, an experienced jeweler, should fix the price of the various items making up the lot merchandise. Before undertaking the work he died and plaintiff thereafter refused to agree upon another person to fix the prices. He cannot take advantage of his own refusal to cooperate in getting proper values on this merchandise.

Plaintiff complains that his salary should not have been included in the expense of the business in figuring the amount of his bonus, citing Selz v. Buel, 105 Ill. 122. In that case the employee was to receive one-fifth of the net profits of the business, and in any event not less that $7,500 a year, whereas in the instant case the plaintiff was to receive $75 a week plus a bonus of 50 per cent of the net profits. The case cited has no application to the present contract, and the salary to plaintiff was properly included as an expense of the business before computing the net profits. Salaries equalling the amount paid plaintiff were allowed to the Rubensteins. Plaintiff objects that these salaries should not be included in the expense of the business in computing plaintiff's half of the net profits. He cites Street v. Thompson, 131 Ill. App. 546, affirmed in 229 Ill. 613. In that case the plaintiff was employed by the partnership at a stated salary, expenses, and one-half of the net profits of the department in which he worked; one of the partners rendered no services to the partnership and salaries

balance in his favor, and to the defendant if the test established overcharges materially greater than tests had previously shown. In view of the undisputed evidence that the overcharges discovered were due to a uniform method of fixing prices, and the finding of the court that the pilferings of the discharged or transferred cards was not willful or fraudulent, we cannot say that a detailed check should have been made.

In the depicting the parties agreed that Mr. Ilbogen, an experienced jeweler, should fix the price of the various items making up the lot exchanged. Before undertaking the work he died and plaintiff thereafter refused to agree upon another person to fix the prices. He cannot take advantage of his own refusal to cooperate in getting proper values on this merchandise.

Plaintiff can claim that his salary should not have been included in the expense of the business in figuring the amount of his bonus, citing Zeis v. Bunt, 105 Ill. 215. In that case the employee was to receive one-fifth of the net profits of the business, and in any event not less than $1,800 a year, whereas in the instant case the plaintiff was to receive 5% a week plus a bonus of 50 per cent of the net profits. The case cited has no application to the present contract, and the salary to plaintiff was properly included as an expense of the business before computing the net profits. Salaries equalling the amount paid plaintiff were allowed to the defendants. Plaintiff objects that these salaries should not be included in the expense of the business in computing plaintiff's half of the net profits. He cites Street v. Thompson, 101 Ill. App. 641, affirmed in 229 Ill. 618. In that case the plaintiff was employed by the partnership at a stated salary, expenses, and one-half of the net profits of the department in which he worked; one of the partners received no services to the partnership and salaries

were fixed for the remaining partners and deducted in ascertaining the net profits of the business. The plaintiff had no knowledge of this agreement. It was held that in the absence of an agreement the presumption is that each partner is required to use his skill, time and labor for the promotion of the interest of the firm, and if it was intended that a part of the salary of one of the partners was to be allowed as an expense of the department, it should have been expressed in the agreement. The rule announced as to a partnership does not apply to corporations. No stockholder or officer is expected to render services to the corporation without compensation, and the salary and expenses of officers, directors and employees are universally deducted in computing net profits. The auditor testified that this is standard accounting practice. No evidence or authority to the contrary has been called to our attention.

Under the consent decree the plaintiff abandoned the contention that he was a partner and accepted the position of an employee of the corporation with a claim against the profits, if any, of Josephson & Company division of the corporation. This position eliminated all claims against the individual defendants, and it was proper to dismiss the complaint as to the Rubensteins.

We have disposed of the principal objections of plaintiff to the accounting decree. We find no merit in other objections raised by him and will not extend this opinion by commenting on each objection.

The decree is affirmed.

AFFIRMED.

O'Connor, P. J., and Feinberg, J., concur.

were fixed for the remaining partners and deducted in ascertaining the net profits of the business. The plaintiff had no knowledge of this agreement. It was held that in the absence of an agreement the presumption is that each partner is required to use his skill, time and labor for the promotion of the interest of the firm, and if it was intended that a part of the salary of one of the partners was to be allowed as an expense of the department, it should have been expressed in the agreement. The rule announced as to a partnership does not apply to corporations. No stockholder or officer is entitled to render services to the corporation without compensation, and the salary and expenses of officers, directors and employees are universally deducted in computing net profits. The contention testified that this is standard accounting practice. No evidence or authority to the contrary has been called to our attention.

Under the consent decree the plaintiff abandoned the contention that he was a partner and accepted the position of an employee of the corporation with a claim against the profits, if any, of Josephson & Company division of the corporation. This position eliminated all claims against the individual defendants, and it was proper to dismiss the complaint as to the defendants.

We have disposed of the principal objections of plaintiff to the accounting decree. We find no merit in other objections raised by him and will not extend this opinion by consideration on each objection.

The decree is affirmed.

Affirmed.

O'Connor, P. J., and Feinberg, J., concur.

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ARNOLD L. MONTGOMERY, Appellee,

v.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a corporation, Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for $37,183 and costs entered on the verdict of a jury in an action based on personal injuries sustained by the plaintiff while serving as an employee of the defendant, engaged in interstate commerce. No question is raised as to the liability of the defendant. Its argument here is limited to matters affecting the damages awarded the plaintiff.

It is objected that the court permitted Dr. Turner, an expert who examined the plaintiff solely for the purpose of testifying, to state: "I noticed as he walked along he held his head and neck stiff and rigid." This objection is sufficiently answered by the fact that no objection to the testimony, or motion to strike it, was made by defendant. Defendant, however, contends that Dr. Turner went much further; that he continued with a detailed description of his examination, some of which was undoubtedly proper, and concluded with a further reference to the stiffness of the back, adding a conclusion concerning the pain suffered by the patient. No reference is made in the brief to the particular testimony of which defendant is complaining. An examination of the record, however, shows that in his examination Dr. Turner found a rigidity ~~of the neck~~ in the posterior neck muscles coming down from the base of the skull toward the shoulders, demonstrated when he palpated the muscles, they being spastic, firm and solid and not soft like a normal muscle; that this spastic condition is indicative of an under-

43783

ARNOLD L. MONTGOMERY,
Appellee,

v.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a corporation,
Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE SCHOLFIELD DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for $17,183 and costs entered on the verdict of a jury in an action based on personal injuries sustained by the plaintiff while serving as an employee of the defendant, engaged in interstate commerce. No question is raised as to the liability of the defendant. Its argument here is limited to matters affecting the damages awarded the plaintiff.

It is objected that the court permitted Dr. Turner, an expert who examined the plaintiff solely for the purpose of testifying, to state: "I noticed as he walked along he held his head and neck stiff and rigid." This objection is sufficiently answered by the fact that no objection to the testimony, or motion to strike it, was made by defendant. Defendant, however, contends that Dr. Turner went much further; that he continued with a detailed description of his examination, some of which was undoubtedly proper, and concluded with a further reference to the stiffness of the back, adding a conclusion concerning the pain suffered by the patient. No reference is made in the brief to the particular testimony of which defendant is complaining. An examination of the record, however, shows that in his examination Dr. Turner found a rigidity xxxxxxxxxxx in the posterior neck muscles coming down from the base of the skull toward the shoulders, demonstrated when he palpated the muscles, they being spastic, firm and solid and not soft like a normal muscle; that this spastic condition is indicative of an under-

lying condition of the muscles which is causing pain. No objection was made to this testimony. The doctor then testified to a definite rigidity of the erector spinae muscles in the lumbar region, and that the spasticity of those muscles "was indicative of an underlying condition which was causing the patient pain in the region of the lumbar region." Defendant moved to strike the last part of the answer on the ground that it was subjective. The court overruled the motion, stating that he understood that the doctor found objectively a certain condition and that he could testify to the result of that condition. There is nothing in the record to indicate that the spasticity of the muscles was subjective and not objective. We see no objection to an experienced physician testifying that a certain condition, which he found objectively, would produce or cause pain.

Plaintiff offered in evidence the Wigglesworth table showing the life expectancy of a man 27 years of age to be 31-1/2 years. Defendant objected to the competency of the table under the evidence before the court. On appeal counsel cite Avance v. Thompson, 387 Ill. 77, and insist that under the holding in that case plaintiff was obliged, by instruction to the jury, to limit and explain the use of the table by the jury in computing damages. Plaintiff offered and the court gave instruction No. 11, which reads as follows: "You are instructed that the life expectancy tables which have been introduced in evidence should not be used as a factor by multiplying the years of expectancy of plaintiff by his annual earnings, because to allow this would permit plaintiff to receive in advance his future earnings, without consideration of other circumstances, which might reasonably reduce his pecuniary loss. In considering the loss of plaintiff's future earnings, if any, it is proper for you to consider in connection with the matters and things in evidence other matters of common observation,

lying condition of the muscles which is causing pain. No objection was made to this testimony. The doctor then testified to a definite rigidity of the erector spinae muscles in the lumbar region, and that the spasticity of those muscles "was indicative of an underlying condition which was causing the patient pain in the region of the lumbar region." Defendant moved to strike the last part of the answer on the ground that it was subjective. The court overruled the motion, stating that he understood that the doctor found objectively a certain condition and that he could testify to the result of that condition. There is nothing in the record to indicate that the spasticity of the muscles was subjective and not objective. We see no objection to an experienced physician testifying that a certain condition, which he found objectively, would produce or cause pain.

Plaintiff offered in evidence the Haggleworth table showing the life expectancy of a man 27 years of age to be 31-1/2 years. Defendant objected to the competency of the table under the evidence before the court. On appeal tonnel site Lyons v. Thompson, 387 Ill. 77, and insist that under the holding in that case plaintiff was obliged, by instruction to the jury, to limit and explain the use of the table by the jury in computing damages. Plaintiff offered and the court gave instruction No. 11, which reads as follows: "You are instructed that the life expectancy tables which have been introduced in evidence should not be used as a factor by multiplying the years of expectancy of plaintiff by his annual earnings, because to allow this would permit plaintiff to receive in advance his future earnings, without consideration of other circumstances, which might reasonably reduce his pecuniary loss. In considering the loss of plaintiff's future earnings, if any, it is proper for you to consider in connection with the matters [illegible] things in evidence other matters of common observation,

knowledge and experience, which in a greater or less degree might have affected the earnings of plaintiff had he continued to work as a brakeman, namely, the probability, if such you find there is, of his illness, loss of employment, abstaining from work, reduction in wages, and infirmities of increasing age, with corresponding diminution of earning capacity." This instruction incorporates part of the language of the court in the Avance case, and in our opinion fully meets the objections raised by defendant. Defendant further objects that as the plaintiff was 28 years of age at the time of the trial, the life expectancy of a person of that age and not the expectancy of a person of plaintiff's age at the time of the injury should have been given to the jury. It is true that the use of the table is in the computation of future damages. However, specific objection as to the age at which the life expectancy should have been computed should have been made at the trial when plaintiff had the table in court and was in a position to meet defendant's objection.

Defendant also objects to instructions 5 and 6 given on behalf of the plaintiff because the federal statute upon which plaintiff was relying was referred to in the instructions as the Federal Employers' Liability Act, to the prejudice of defendant. These instructions relate solely to the liability of the defendant, which is not questioned here, and therefore error, if any, in the instructions is immaterial.

Defendant objects to the argument of plaintiff's counsel. In the arguments to the jury each side charged the opposition with unfairness and claimed virtue for himself. It would have been better if plaintiff's counsel had not made some of the statements shown in the record and complained of. It was improper for him to argue that if plaintiff was not crippled as he contended, but was able to work, the defendant should have offered him a job, but we

knowledge and experience, which in a greater or less degree might have affected the earnings of plaintiff had he continued to work as a brakeman, namely, the probability, if such you find there is, of his illness, loss of employment, abstaining from work, reduction in wages, and infirmities of increasing age, with corresponding diminution of earning capacity." This instruction incorporates part of the language of the court in the Average case, and in our opinion fully meets the objections raised by defendant. Defendant further objects that as the plaintiff was 28 years of age at the time of the trial, the life expectancy of a person of that age and not the expectancy of a person of plaintiff's age at the time of the injury should have been given to the jury. It is true that the use of the table is in the computation of future damages. However, specific objection as to the age at which the life expectancy should have been computed should have been made at the trial when plaintiff had the table in court and was in a position to meet defendant's objection.

Defendant also objects to instructions 3 and 6 given on behalf of the plaintiff because the federal statute upon which plaintiff was relying was referred to in the instructions as the Federal Employers' Liability Act, to the prejudice of defendant. These instructions relate solely to the liability of the defendant, which is not questioned here, and therefore error, if any, in the instructions is immaterial.

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do not consider this error or the statement of counsel that it was the duty of the jury to protect the plaintiff against the railroad, etc., serious enough to warrant a reversal of the case, no other substantial error appearing in the record.

Finally it is claimed that the damages awarded are so excessive as to demand a new trial. The case was tried within six months of the accident in which plaintiff was injured. Plaintiff complained of severe pain with headaches, of stiffness and limitation of motion in the neck and in the lumbar region, and of an atrophy of the right thigh. Medical witnesses testified to an injury to the sciatic nerve, and Dr. Turner, the medical expert for plaintiff, testified that plaintiff's injuries were permanent, that he was then and would be unable to resume his employment as a railroad brakeman, a position requiring activity and strength. The jury accepted the testimony as true. Defendant offered the testimony of two witnesses - an employee of defendant, and his wife - as to physical activities of the plaintiff in his home-town of Winslow, Arizona, inconsistent with the injuries claimed by the plaintiff and found by his medical witnesses. Except for a conflict in the testimony as to what was shown by X-ray photographs received in evidence, there is no conflict in the medical testimony, and we cannot substitute our judgment as to the damages actually sustained for the judgment of the jury and the trial court, who had the advantage of hearing and seeing the witnesses who testified. Accepting as we must the testimony as to plaintiff's injuries, including their permanency, we cannot say that the verdict of the jury, approved by the trial court, is so grossly excessive as to warrant setting aside the verdict and granting a new trial.

The judgment is affirmed.

JUDGMENT AFFIRMED.

O'Connor, P. J., and Feinberg, J., concur.

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The judgment is affirmed.

JUDGMENT AFFIRMED.

O'Connor, P. J., and Weinberg, J., concur.

43812

330 I.A. 335

WILLIAM J. HUFF,
Appellee,

v.

WALTER J. CUMMINGS and DANIEL C. GREEN, as Receivers of Chicago Railways Co., a corporation, CHARLES H. ALBERS and EDWARD J. FLEMING, as Receivers of Chicago City Railway Company and the Southern Street Railway Company, corporations, doing business as CHICAGO SURFACE LINES, and ALLIED CONSTRUCTION COMPANY, a Corporation, and GEORGE ORLOVIK,
Defendants,

On the Appeal of ALLIED CONSTRUCTION COMPANY, a corporation, and GEORGE ORLOVIK,
Appellants.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendants Allied Construction Company and George Orlovik, the latter the driver of the auto-truck of the construction company involved in a collision with the automobile of plaintiff, appeal from a judgment for $3,000 entered against them in an action for damages resulting from the personal injuries sustained by plaintiff in the collision.

The collision occurred on south Cicero avenue near 72nd street, outside the city limits of Chicago, on January 20, 1943 sometime after 2 o'clock in the morning. The temperature was 16° below zero. It was snowing and the wind was blowing. Defendants' truck had a snow plow attached to the front. It was being driven south along Cicero avenue and employees on it were engaged in spreading salt at the stopping places of buses operated by the Surface Lines. Plaintiff had closed his tavern at 5400 W. 95th street and had driven in his car to Cicero avenue and then north to the place of the accident. On the trial he testified that he was driving 15 or 20 miles per hour; that he

had his heater on and his windshield wiper working; that at 72nd street he suddenly noticed a snow plow without lights, and the snow and the salt or whatever was being thrown from the truck blinded him; that he put on his brakes and collided with the left front side of the truck and was rendered unconscious. Witnesses for the defendants testified that the truck was on the west or southbound lane of Cicero avenue, a 4-lane highway; that it had several lights on the front, fully lighted, and some on the rear; that it was moving southward at 2 or 3 miles an hour.

In the examination of the plaintiff he was shown a 2-page statement. He testified that the signature to it looked like his signature; that he did not remember signing it and could not say whether it was in the same condition as when the signature was placed on it. This statement contradicts the testimony of the plaintiff on the trial. It states that he was driving north at about 35 miles per hour, when at 72nd and Cicero avenue he suddenly hit an object; that he did not see it, even though his lights were on, and he did not know how he struck the snow plow. On the objection by the plaintiff, made at the suggestion of the court, the statement was excluded. It is argued here that the signature was not sufficiently proved; that plaintiff's attention to the contents of the instrument was not drawn, and there is no evidence that it is in the same condition as it was when signed. The statement shows on its face that it was taken 12 days after the accident. Plaintiff's injuries were superficial and there is no suggestion that he was kept under opiates or suffered excruciating pain for any period of time. No witness, and especially no party to the suit should be permitted to evade answering directly a question as to whether or not a signature shown him is his own by resorting to the subterfuge of saying "It looks like my signature." In the circumstances shown by this record we hold that the signature was sufficiently proved,

had his back to us and his shoulders above somewhere; that it
"did appear to suddenly develop a knee from nowhere, leaving the
the elbow and the wall or whatever was being struck from the
trunk dislocated also; that he was on his hands and mutilated with
the left front side of the trunk and the remaining shoulder.
Witnesses for the defendants testified that the front and on the
west or backbound line of Thayer avenue, a 9-line discovery that
it had several limbs on the road, body (torso), and one
on the hair; that it was having attached to it or related to
that.

In the examination of the plaintiff he was shown a
statement. He testified that the alleged to be Jacob Cohen
his signature; that he did not remember signing it and could not
say whether it was in the same condition as when the signature
was placed on it. The witnesses contradicts the testimony of
the plaintiff on the trial. It appears that in the middle
months at about 6 miles per hour, somewhere that was Thayer avenue
he noticed his shoulder; that he did not see it, when looking
his limbs were on, and he did some one to assume the same
place. On the contrary to the plaintiff, such as the superintendent
of the court, the witnesses are mutilated. It is shown here that
the attorneys are not sufficiently precise: that plaintiff's
attention to the contents of the indictment was not drawn, and
there is no evidence that it is in the same condition as it was
when placed. The statement shows on the face that it was found
12 days after the accident. Plaintiff's injuries were mutilated
fatal and there is no evidence that he was kept under treatment
or suffered excruciating pain for any period of time. In closure,
and especially in the suit should be provided by
answering directly a question as to whether or not a statement
taken his in fact was by reporting to the contents of which
"is 100% true by signature." In the circumstances there is
this record to hold that the signature and mutilation proved,

and there being no evidence of any change or addition to the statement brought to our attention, it is satisfactorily proven that the statement is in its original condition. Under authority of Illinois Central R. Co. v. Wade, 206 Ill. 523, nothing further was necessary to make the statement admissible in evidence.

One of the controversies on the trial was whether or not the southbound truck was on the wrong side of the road: that is, on the east or northbound side at the time of the collision. A police report made by officers who had arrived at the scene some time after the accident included a roughly drawn diagram, of little if any probative value, showing the location of the truck and automobile involved in the accident. Each of the parties interpreted the diagram in their favor and agreed that it, with the remaining portion of the report, should be received in evidence. Notwithstanding this agreement the court rejected the report, whereupon counsel for plaintiff, examining one of the officers, said, "According to this document, you placed the car on the east side with the truck going over the center of the road facing east?" Counsel for defendant objected and moved to withdraw a juror. The court sustained the objection but denied the motion to withdraw a juror, stating in the presence of the jury: "After putting in all this time, he wants to get the case dismissed by having a juror withdrawn. I am not going to permit him to do that." The question put by counsel was plainly erroneous. He attempted thereby to get before the jury a part of the contents of a written document which the court had refused to receive in evidence, and as it related to a vital question the motion should have been allowed.

In argument to the jury plaintiff's counsel said, "They say the defendant Orlovik is an interested party. He is the agent of the corporation, and he will not in any way be affected

and there being no evidence of any absence or addition to the statement brought to our attention, it is satisfactorily proven that the statement is in the original condition. Under authority of Illinois Central R. Co. v. Pope, 206 Ill. 621, proof of further that was necessary to make the statement admissible in evidence.

One of the controversies on the trial was whether the southbound train was on the wrong side of the road: that is, on the east or northbound side at the time of the collision. A police report made by officers who had arrived at the place soon thereafter after the accident included a roughly drawn diagram, of little if any probative value, showing the location of the truck and automobile involved in the accident. Each of the police interpreted the diagram in their favor and argued that it, with the remaining portion of the report, should be considered in evidence. Notwithstanding this argument the court excluded the report, exception overruled for "lackwit", remarking and at the officers, said, "According to this diagram, you placed the car on the east side with the truck going over the middle of the road (color each)" Counsel for defendant objected and urged to withdraw a juror. The court overruled the objection but denied the motion to withdraw a juror, stating in the presence of the jury: "After putting in all this time, do want to let the case disagreed by having a juror withdrawn. I do not want to permit him to do that." The question put to counsel was plainly erroneous. He attempted thereby to get before the jury a part of the contents of a written document which the court had refused to receive in evidence, and as it related to a vital question the motion should have been allowed.

In response to the jury plaintiff's counsel said, "They say the defendant Zelovik is an interested witness. He is the agent of the corporation, and he will act in any way in interest

by any judgment you may enter." Defendants' objection was overruled. The statement of counsel was a misstatement of the law. By the judgment entered on the verdict returned by the jury the driver, Orlovik, is with his employer liable for the full amount of damages awarded.

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

O'Connor, P. J., and Feinberg, J., concur.

by any judgment you may enter." Defendants' objections were overruled. The statement of counsel was a misstatement of the law. By the judgment entered on the verdict returned by the jury the driver, Orlovik, by with his employer liable for the full amount of damages awarded.

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

O'Connor, P. J., and Feinberg, J., concur.

43852

330 I.A. 335

THE PEOPLE OF THE STATE OF ILLINOIS on the Relation of ROBERT RYAN,
Appellant,

v.

CITY OF CHICAGO, a Municipal Corporation, and EDWARD J. GORMAN, Public Vehicle Commissioner,
Appellees.

APPEAL FROM CIRCUIT COURT COOK COUNTY.

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment order dismissing his complaint for mandamus.

His petition set up that he was engaged in the business of renting automobiles to the public for hire under licenses issued by the State of Illinois as livery licenses, with his offices located in Chicago, Illinois; that he carried the proper liability bond or insurance policy for each automobile; that he had made application to the City of Chicago for city licenses for the operation of 31 automobiles and tendered the requisite fee therefor. This application was rejected, and he seeks by mandamus to compel the issuance of the city licenses. The petition also quotes certain portions of a then-existing city ordinance requiring application for such licenses to be made by the owner of the automobile. The answer of the city denied that the plaintiff was the owner of any of the automobiles, except those numbered 3, 5, and 6; asserted that the licenses for these cars were denied because of the lack of repair, and dirty, unclean and bad appearance of the automobiles; that licenses for the other cars were refused because plaintiff was not the owner of the cars and because of their unsatisfactory condition. On the trial the city offered the testimony of

43852

THE PEOPLE OF THE STATE OF)
ILLINOIS on the Relation of)
ROBERT RYAN,)
Appellant,)
)
v.)
)
CITY OF CHICAGO, a municipal)
Corporation, and EDWARD J.)
GORMAN, Public Vehicle Commis-)
sioner,)
Appellees.)
)

APPEAL FROM
CIRCUIT COURT
COOK COUNTY.

MR. JUSTICE DUNNIGAN delivered the opinion of the court.

Plaintiff appeals from a judgment order dismissing his complaint for mandamus.

His petition set up that he was engaged in the business of renting automobiles to the public for hire under licenses issued by the State of Illinois as livery licenses, with his offices located in Chicago, Illinois; that he carried the proper liability bond or insurance policy for each automobile; that he had made application to the City of Chicago for city licenses for the operation of 21 automobiles and tendered the requisite fee therefor. This application was rejected, and he seeks by mandamus to compel the issuance of the city licenses. The petition also quotes certain portions of a then-existing city ordinance requiring application for such licenses to be made by the owner of the automobile. The answer of the city denied that the plaintiff was the owner of any of the automobiles, except those numbered 2, 3, and 8; asserted that the licenses for these cars were denied because of the lack of repair, and dirty, unclean and bad appearance of the automobiles; that licenses for the other cars were refused because plaintiff was not the owner of the cars and because of their unsatisfactory condition. On the trial the city offered the testimony of

inspectors as to the condition of the cars. This testimony is uncontradicted except by general statements. Plaintiff testified that he was the lessee of the cars not owned by him, but the leases said to cover these cars were not produced and offered in evidence. Plaintiff did not file a reply brief or appear on the oral argument of the case.

Considerable discussion is had by the parties as to whether or not a lessee is the owner of a car within the ordinance. The parties agree that the word "owner" as used in the ordinance should have the same meaning and definition as that set forth in the Motor Vehicle Law of the state (Ill. Rev. Stat. 1945, chap. 95 1/2, par. 74), which, so far as is pertinent here, provides that "*** in the event a motor vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee, or in the event a mortgagor of a motor vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purpose of this act." The plaintiff failed to bring himself within the terms of the ordinance by establishing through the proffer of proper evidence his ownership, under the provisions of the statute, of the cars which he claimed to possess under leases. He also failed to meet the testimony as to the unsatisfactory condition of these cars, as well as of the three cars of which he was the owner. Before a mandamus writ may issue, it must clearly appear that the petitioner has a clear right to the relief he seeks. The People v. Allman, 382 Ill. 156.

The judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and Feinberg, J., concur.

inspectors as to the condition of the cars. This testimony is uncontradicted except by general statements. Plaintiff testified that he was the lessee of the cars not owned by him, but the leases said to cover these cars were not produced and offered in evidence. Plaintiff did not file a reply brief or appear on the oral argument of the case.

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The judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and Feinberg, J., concur.

43888

330 I.A. 336

LESTER R. GRAHAM,
Appellant,

v.

ANNA M. READY,
Appellee.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff, a tenant of a farm owned by defendant, filed a complaint in the Circuit court of Kane county, Illinois, where the land was situated, for an injunction restraining the enforcement of a judgment for possession which defendant had previously obtained against plaintiff.

On November 19, 1943, during the pendency of the injunction suit, the attorneys for the parties entered into a written stipulation reciting the payment by plaintiff to defendant of $2,670.81 in full of defendant's claims for damages for withholding possession, etc., and the deposit by plaintiff of an additional sum of $3,000 with the clerk of the court to be held by the clerk in escrow subject to the stipulation and the order of the court; that if on March 1, 1944 plaintiff had fully vacated said premises and delivered possession to the defendant, the court should order the $3,000 to be returned to the plaintiff; but if on March 1, 1944 plaintiff had not then fully vacated the premises and delivered the possession thereof to the defendant, the court should order the clerk to pay the $3,000 to the defendant and dismiss the injunction suit. On March 1, 1944, the plaintiff still being in possession of the premises, the judge of the Circuit court of Kane county ordered the clerk to pay the $3,000 to the defendant, and it was so paid. March 17, 1944 plaintiff vacated the premises.

LESTER R. GRAHAM, Appellant,	
v.	APPEAL FROM SUPERIOR COURT COOK COUNTY.
ANNA M. REAGY, Appellee.	

MR. JUSTICE MILLER DELIVERED THE OPINION OF THE COURT.

Plaintiff, a tenant of a farm owned by defendant, filed a complaint in the Circuit court of Lake county, Illinois, where the land was situated, for an injunction restraining the enforcement of a judgment for possession which defendant had previously obtained against plaintiff.

On November 19, 1943, during the pendency of the injunction suit, the attorneys for the parties entered into a written stipulation recciting the payment by plaintiff to defendant of $3,870.81 in full of defendant's claims for damages for withholding possession, etc., and the deposit by plaintiff of an additional sum of $3,000 with the clerk of the court to be held by the clerk in escrow subject to the stipulation and the order of the court; that if on March 1, 1944 plaintiff had fully vacated said premises and delivered possession to the defendant, the court should order the $3,000 to be returned to the plaintiff; but if on March 1, 1944 plaintiff had not then fully vacated the premises and delivered the possession thereof to the defendant, the court should order the clerk to pay the $3,000 to the defendant and dismiss the injunction suit. On March 1, 1944, the plaintiff still being in possession of the premises, the judge of the Circuit court of Lake county ordered the clerk to pay the $3,000 to the defendant, and it was so paid. March 17, 1944 plaintiff vacated the premises.

May 15, 1944, plaintiff filed a complaint in the Superior court of Cook county, that county being the place of residence of the defendant, in which he alleged that the foregoing stipulation was not authorized by the plaintiff and did not correctly express the real agreement of the parties, and praying that "said stipulation may be varied and modified in order to express the real intention of the plaintiff and defendant; that the court may adjudge said sum of $3,000 deposited with the clerk of the Circuit Court of Kane County, and subsequently paid to the defendant, was paid only as a penal sum as security to reimburse the defendant only for such damages as she might establish for waste and for failure of plaintiff to surrender possession on or before March 1, 1944, and that the court will construe the payment of said sum as a penalty and not as a liquidated damages;that the court will determine what portion the defendant is entitled to retain of said sum of $3,000 for reasonable rental from March 1, 1944, to March 17, 1944, and order the defendant to pay the plaintiff the balance remaining of said sum of $3,000 after such reasonable rental charge is deducted." Defendant answered, setting up the proceedings in the Circuit court of Kane county as res judicata of plaintiff's claim. Plaintiff's reply to the answer was stricken on defendant's motion and, plaintiff standing on the reply which negatived defendant's claim of res judicata, the complaint was dismissed for want of equity. Plaintiff appeals.

The order entered by the Circuit court of Kane county directing the clerk of the court to pay over the sum of $3,000 to defendant has not been appealed from. It has been fully executed. By his complaint in the Superior court of Cook county plaintiff seeks to compel defendant by an order of the Superior court to return the money paid to her in compliance with the order of the Circuit court of Kane county, less such amount as the Superior court may find to be due to defendant for the reasonable rental of her

May 15, 1944, plaintiff filed a complaint in the Superior court of Doe county, that county being the place of residence of the defendant, in which he alleged that the foregoing stipulation was not authorized by the plaintiff and did not correctly express the real agreement of the parties, and praying that "said stipulation may be varied and modified in order to express the real intention of the plaintiff and defendant; that the court may adjudge said sum of $5,000 deposited with the clerk of the Circuit Court of Lane County, and subsequently paid to the defendant, was paid only as a penal sum as security to reimburse the defendant only for such damages as she might establish for waste and for failure of plaintiff to surrender possession on or before March 1, 1944, and that the court will construe the payment of said sum as a penalty and not as a liquidated damages;that the court will determine what portion the defendant is entitled to retain of said sum of $5,000 for reasonable rental from March 1, 1944, to March 15, 1944, and order the defendant to pay the plaintiff the balance remaining of said sum of $5,000 after such reasonable rental charge is deducted." Defendant answered, setting up the proceedings in the Circuit court of Lane county as res judicata of plaintiff's claim. Plaintiff's reply to the answer was evidence on defendant's motion and, plaintiff standing on the reply which asserted defendant's claim of res judicata, the complaint was dismissed for want of equity. Plaintiff appeals.

The order entered by the Circuit court of Lane county directing the clerk of the court to pay over the sum of $5,000 to defendant has not been appealed from. It has been fully executed. By his complaint in the Superior court of Doe county plaintiff seeks to compel defendant by an order of the superior court to return the money paid to her in compliance with the order of the Circuit court of Lane county, less such amount as the Superior court may find to be due to defendant for the reasonable rental of her

farm from March 1st to March 17, 1944, etc. The Superior court is without jurisdiction in the matter. The matters and things alleged as the basis of the relief prayed for by plaintiff are matters and things which could have been alleged and presented in the Circuit court of Kane county at the time the order directing the payment of the money to defendant was entered, and certainly at any time after March 17, 1944 within 30 days after the entry of the order of March 1, 1944. Having neglected to do this, and no appeal having been taken from the order of the Circuit court, that order became binding and conclusive on plaintiff and defendant as to any and all matters which might have been raised in the Circuit court. Harding Co. v. Harding, 352 Ill. 417.

The order is affirmed.

ORDER AFFIRMED.

O'Connor, P. J., and Feinberg, J., concur.

fers from March 1st to March 17, 1944, etc. The superior court is without jurisdiction in the matter. The motions and things filed as the basis of the relief prayed for in plaintiff's petitions and things which could have been filed and presented in the Circuit court of Ben County at the time the order directing the payment of the money in controversy was entered, and certainly at any time after March 17, 1944 within 30 days after the entry of the order of March 1, 1944. Having neglected to do this, and no appeal having been taken from the order of the Circuit court, that order became binding and conclusive on plaintiff and defendant in as ample and all matters which might have been raised in the Circuit court. Harding Co. v. Harding, 382 Ill. 417.

The order is affirmed.

ORDER AFFIRMED.

O'Connor, P. J., and Friedman, J., concur.

43916

3301 I.A. 336

MERCURY ELECTRONIC LABORATORIES, INC., a corporation, Appellee,	)
v.	) APPEAL FROM SUPERIOR COURT COOK COUNTY.
MARIE KRUG, Appellant.	)

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff, a tenant of the defendant, filed a complaint to enjoin the forfeiture of the lease from defendant to plaintiff and to enjoin the prosecution of a suit in forcible detainer for recovery of the possession of the premises involved. After trial a decree was entered granting the relief prayed. Defendant appeals.

Plaintiff rented from defendant the basement, first floor and second floor of defendant's building to be occupied for an office, store, factory or warehouse for a period of ten years from May 1, 1944, the lease providing that the tenant will not allow the premises "to be occupied in whole or in part by any other person, and will not sublet the same, nor any part thereof, *** without in each case the written consent of the party of the first part first had." Plaintiff immediately took posession under the lease and claims to have expended in excess of $7,000 in making the premises tenantable. In November 1945 it entered into an agreement with a credit or industrial loan company to extend it credit up to $35,000 upon merchandise of the plaintiff to be stored with a warehouse company, certificates being issued therefor - the merchandise to be released in instalments as the loans were paid. In furtherance of this agreement a certain portion of the basement and first floor of the premises occupied by plaintiff was set off by a wire net and the merchandise or goods pledged as collateral was stored in this space. An

MODERN ELECTRONIC LABORATORIES, INC., a corporation, Appellee,	
vs.	ARTHUR FRIEDMAN, EXECUTRIX OF THE ESTATE OF WALTER FRIEDMAN, Appellant.

Mr. Justice Schwartz delivered the opinion of the court.

Plaintiff, a tenant of the premises, filed a complaint to enjoin the forfeiture of his lease and permission to plaintiff and to enjoin the prosecution of a suit to recover damages for recovery of the possession of his premises involved. After trial a decree was entered granting the relief prayed. Defendant appeals.

Plaintiff rented from defendant the basement, rear first and second floor of defendant's building to be occupied for an office, store, factory or warehouse for a period of ten years from May 1, 1946, the lease providing that the tenant will not allow the premises "to be occupied in whole or in part by any other person, and will not assign the same, nor any part thereof, without in each case the written consent of the party of the first part first had." Plaintiff immediately took possession under the lease and claims to have expended in excess of $3,000 in making the premises habitable. On December 1, 1947, defendant into an agreement with a person in business also occupying the entire premises up to $3,000 upon satisfactory proof of the ability to be vacated with a reasonable notice, certain to be being issued thereafter - the premises to be released in proportion as the leases were paid. In furtherance of this agreement a certain portion of the basement and first floor of the premises occupied by plaintiff was set off by a wire net and the usual notice to vacate pledged as collateral was served in this space. As

employee of plaintiff was appointed by the warehouse company as its agent and given the custody and control of the goods and merchandise. He continued to perform the services theretofore rendered by him for plaintiff. An instrument designated as a sublease providing for the occupancy of the portion of the premises set aside as aforesaid to the warehouse company was executed and later filed for record. Only a part of the premises allocated to the warehouse company was used by it, and no part of the premises was used for any other purpose than the storing of the goods and merchandise pledged as collateral. There is evidence that before arrangements with the credit company and the warehouse company were completed plaintiff conferred with the defendant and obtained her oral consent to the arrangement. Defendant denies giving her consent, but considered as a whole the evidence would support a finding by the court that such consent was given. Shortly after the recording of the sublease defendant served notice of the forfeiture of the lease because of the subletting, and instituted an action of forcible detainer to recover possession of the premises.

Plaintiff contends that the arrangement for the occupancy and use of a portion of the leased premises by the warehouse company was not a subletting prohibited by the terms of the lease, but an arrangement in furtherance of plaintiff's business and therefore not a violation of the lease. This position finds support in Peacock v. Feltman, 243 Ill. App. 236, Boston El. Ry. Co. v. Grace & Hyde Co., 112 Fed. 279, 285-286. It is immaterial that the instrument executed between plaintiff and the warehouse company was in terms of a subletting, because equity looks to the substance rather than to the form of written instruments and carries into effect the real intention of the parties, gleaned not only from the written instruments they executed, but from their subsequent acts and conduct with reference thereto. Trapp v. Gordon, 366 Ill. 102, 111.

employee of plaintiff was appointed by the warehouse company as its agent and given the custody and control of the goods and merchandise. He continued to perform the services theretofore rendered by him for plaintiff. An instrument designated as a sublease providing for the occupancy of the portion of the premises set aside as aforesaid to the warehouse company was executed and later filed for record. Only a part of the premises allocated to the warehouse company was used by it, and no part of the premises was used for any other purpose than the storing of the goods and merchandise pledged as collateral. There is evidence that before arrangements with the credit company and the warehouse company were completed plaintiff conferred with the defendant and obtained her oral consent to the arrangement. Defendant denies giving her consent, but considered as a whole the evidence would support a finding by the court that such consent was given. Shortly after the recording of the sublease defendant served notice of the forfeiture of the lease because of the subletting, and instituted an action of forcible detainer to recover possession of the premises.

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Defendant makes a further objection that the arrangement between plaintiff and the credit company defeated defendant's prior lien as landlord on the property of plaintiff. We know of no provision of the law or of the lease, and none has been suggested to us, which prohibits a tenant when acting in good faith from encumbering his property and creating liens thereon which take precedence over the landlord's lien.

The judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and Feinberg, J., concur.

Defendant makes a further objection that the arrangement between plaintiff and the credit company defeated defendant's prior lien as landlord on the property of plaintiff. In spite of no provision of the law or of the lease, and none has been suggested to us, which prohibits a tenant from acting in good faith from encumbering his property and creating liens thereon which take precedence over the landlord's lien.

The judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and Tolbert, J., concur.

43939

330 I.A. 337

CITY OF EVANSTON, Appellee, v. MRS. ONA VERE HOPKINS, Appellant.	APPEAL FROM MUNICIPAL COURT OF EVANSTON.

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment of the Municipal court of Evanston finding her guilty of keeping a house of ill-fame in violation of the ordinance of the City, and assessing a fine of $50 and costs.

Defendant was operating what she designated as a rooming house in the City of Evanston. On the night of the 4th day of April, 1946 at about 10:30 o'clock, two police officers who had for some time been watching various couples enter, walked up the front steps of the premises in question. A light outside showed the sign "Public Telephone." The door was open. The officers entered. One of them walked downstairs and saw the defendant putting clean sheets on a bed. In the presence and hearing of defendant he saw through an open door a man and woman undressed lying in bed. They said that they were unmarried. In other rooms he saw six other couples, all of whom stated they were unmarried, except one couple who said they were not married to each other. Most of them were undressed, and almost all were in bed. One man who was with a woman stated that he rented the room for an hour and a half for $2. One couple in the front room stated they were waiting to get a room because all rooms were occupied. The officers arrested the defendant, who was in charge of the premises and all of the inmates.

Before the trial defendant filed a petition alleging the illegal entry and search of the premises and the purpose of

the prosecution to use the testimony of the inmates and the evidence secured while making the unlawful search and seizure on the trial of the case, and moved for the exclusion of the evidence. This motion was denied. On the trial a stipulation was entered into as to the testimony of the defendant and the persons in her rooming house at the time of the arrest if defendant's motion was overruled and denied. The testimony clearly shows that the place was being used for the accommodation of persons coming there for the purpose of illicit intercourse.

Defendant's objections necessary to be considered on this appeal are, that the arrest of the defendant was unlawful and that the testimony of the police officers and stipulated testimony of the defendant and the persons found in her rooming house was improperly received, having been obtained through the unlawful search of the premises by the police officers, and, that the house was not shown to be a house of ill-fame within the meaning of the ordinance.

This action being to recover a penalty for the violation of a city ordinance, is a civil suit and governed by all the rules applicable thereto. City of Chicago v. Knobel, 232 Ill. 112; City of Chicago v. Walcher, 327 Ill. App. 556 (abst.). Defendant appeared on the trial without objection to the manner of her arrest, and she cannot now be permitted to complain. The public telephone sign at the entrance - the door not being shut and locked, authorized an entry into the building as into any premises where a public business was being conducted. Having gained entrance lawfully, the police officers were authorized to take advantage and act upon whatever they heard or saw in the premises. The conversations in the presence of defendant, with the couples seen in bed through the open door and with the couple upstairs waiting for a room to be vacated, authorized the arrest of defendant and the couple spoken to, and a further search or investigation of the premises. People v. Roberta, 352 Ill. 189; People v.

the prosecution to use the testimony of the inmates and the evidence secured while making the unlawful search and seizure on the trial of the case, and moved for the suppression of the evidence. This motion was denied. On the trial a stipulation was entered into as to the testimony of the defendant and the persons in her rooming house at the time of the arrest if defendant's motion was overruled and denied. The testimony clearly shows that the place was being used for the accommodation of persons coming there for the purpose of illicit intercourse.

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This action being to recover a penalty for the violation of a city ordinance, is a civil suit and governed by all the rules applicable thereto. City of Chicago v. Lonergan, 225 Ill. 124; City of Chicago v. Salmer, 207 Ill. App. 268 (abst.). Defendant appeared on the trial without objection to the manner of her arrest, and she cannot now be permitted to complain. The public telephone sign at the entrance - the door not being shut and locked, authorized an entry into the building as into any premises where a public business was being conducted. Having lawful entrance lawfully, the police officers were authorized to take advantage and act upon whatever they heard or saw in the premises. The conversations in the presence of defendant, with the couple seen in bed through the open door and with the couple upstairs waiting for a room to be vacated, authorized the arrest of defendant and the couple spoken to, and a further search or investigation of the premises. People v. Roberts, 302 Ill. 182; People v.

Berger, 284 Ill. 47. The court therefore did not err in admitting the testimony complained of.

The ordinance involved provided that "No person shall keep or maintain *** any house of ill-fame or assignation." Defendant refers to several cases involving charges of keeping a house for purposes of prostitution wherein a house of ill-fame is defined as a house of prostitution or a place to which women resort for indiscriminate intercourse with men, and contends that there is no evidence in the present case that the women found in defendant's rooming house were engaged in indiscriminate intercourse. A house of ill-fame is not specifically defined in our statutes or in the ordinances of the City of Evanston. Resort, therefore, may be had to the common law, under which a house of ill-fame is one kept for the resort and convenience of lewd people of both sexes. 17 Am. Jur., Disorderly Houses, sec. 3. The word "lewd" is generally defined as lustful, lascivious, unchaste. Some of its synonyms are, licentious, sensual, lecherous, impure. The renting of the rooms by the hour, the full occupancy of the premises, and the waiting by a couple until a room and bed should be vacated, together with the uncontradicted statements of the persons in the building that they were not married to their companions, fully satisfy the common law definition of a house of ill-fame.

Furthermore, the complaint charged the defendant with maintaining and keeping a house of ill-fame at the address given "by accepting lawful money for rent of rooms and beds for occupancy by males and females for lewd purposes in violation of section 2434 of the Evanston Municipal Code of 1927, as amended." If it is defendant's contention that the evidence proved the house to be one of assignation rather than of

Berger, 284 Ill. 47. The court therefore did not err in admitting the testimony complained of.

The ordinance involved provided that "no person shall keep or maintain *** any house of ill-fame or prostitution." Defendant refers to several cases involving charges of keeping a house for purposes of prostitution wherein a house of ill-fame is defined as a house of prostitution or a place to which women resort for indiscriminate intercourse with men, and contends that there is no evidence in the present case that the women found in defendant's rooming house were engaged in indiscriminate intercourse. A house of ill-fame is not mathematically defined in our statutes or in the ordinances of the city of Evanston. Resort, therefore, may be had to the common law, under which a house of ill-fame is one kept for the resort and convenience of lewd people of both sexes. 17 Am. Jur., Disorderly Houses, sec. 6. The word "lewd" is generally defined as meaning lascivious, wanton. Some of the synonyms are, licentious, sensual, lecherous, impure. The renting of the rooms by the hour, the full occupancy of the premises, and the waiting by a couple until a room and bed should be vacated, together with the unsatisfactory statements of the proprietress in the building that they were not married to their companions, fully satisfy the common law definition of a house of ill-fame.

Furthermore, the complaint charged the defendant with maintaining and keeping a house of ill-fame at the address given "by accepting lawful money for rent of rooms and beds for occupancy by males and females for lewd purposes in violation of section 2434 of the Evanston Municipal Code, of 1927, as amended." If it is defendant's contention that the evidence proved the house to be one of assignation rather than of

ill-fame, the alleged variance should have been pointed out on the trial of the case when the complaint could have been amended if necessary to meet the objection.

The judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and Feinberg, J., concur.

ill-fame, the alleged variance should have been pointed out on the trial of the case when the complaint could have been amended if necessary to meet the objection.

The judgment is affirmed.

AFFIRMED.

O'Connor, J. A., and Leinbach, J., concur.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

October Term, A. D. 1946

330 I.A. 427

TERM NO. 46 0 1 Agenda No. 8

WILLIAM ADKINS and FRED W. MILLER, Plaintiffs-Appellants, vs. LORENE WILLIAMS, Defendant, IMOGENE FEHRENBACHER, FRANCES ALBRIGHT, JOHN C. HOUCHIN, STELLA H. HOUCHIN, Defendants-Appellees.	Appeal from the Circuit Court of Jasper County.

CULBERTSON, P. J.

This is an appeal from a judgment of the Circuit Court of Jasper County (on the verdicts of a jury), finding for Appellees, IMOGENE FEHRENBACHER, FRANCES ALBRIGHT, JOHN C. HOUCHIN, STELLA H. HOUCHIN, and LORENE WILLIAMS (hereinafter called defendants), and against Appellants, WILLIAM ADKINS and FRED W. MILLER (hereinafter called plaintiffs).

Plaintiffs' action was instituted under the Dram Shop Act (1945 ILLINOIS REVISED STATUTES, Chapter 43, Section 135), and sought to recover damages for injuries sustained by the

plaintiffs by reason of an assault and physical beating by one HIRAM TRACY upon the plaintiffs, William Adkins and Fred W. Miller. The evidence disclosed that Adkins and Miller and Tracy had been drinking in a tavern known as "Mike's Place." The defendants, Imogene Fehrenbacher, and the husband of defendant Lorene Williams, were partners in the ownership of the tavern conducted as Mike's Place, and defendant, Frances Albright, owned the premises in which Mike's Place was located. Defendants, John C. Houchin and Stella H. Houchin were respectively the operator and owner of the premises known as "West Side Tavern." The evidence indicated that Hiram Tracy had consumed alcoholic liquors in both taverns. The cause was tried by a jury.

There was evidence to the effect that Hiram Tracy was celebrating and had been going from table to table in Mike's Place, and particularly, had been having some conversation with the plaintiff Miller, and also was drinking in his company. He had previously been drinking in the West Side Tavern and left Mike's Place at one stage to go to the West Side Tavern again. Tracy testified that he and Miller had been arguing and that plaintiff Adkins had purchased a round of drinks for him. Tracy and Adkins had been acquainted for many years. The evidence was conflicting as to whether Miller and Adkins were drinking with Tracy, but the evidence did show that in some manner Tracy and Miller got into an altercation when Miller declined to drink out of his glass of beer after Tracy had taken a drink from it. Tracy then emptied the beer in a spittoon and after he had gone from the tavern for ten or fifteen minutes, Tracy returned, picked up a glass and struck Miller in the face with the glass. After it broke he continued to jab Miller in the face with the broken glass. Miller

was badly cut up in the face and also about the hand. There was testimony that some words were exchanged between Adkins and Tracy before Tracy struck Adkins, who was one of the joint plaintiffs in the action. After hearing all of the evidence the jury returned a verdict of "not guilty" as to all defendants. Motion for new trial was denied and judgments were entered on the verdicts finding defendants "not guilty."

The plaintiffs contend in this Court that the Court below erred in refusing to admit certain evidence tendered on behalf of plaintiffs, and likewise, in admitting improper evidence on behalf of defendants. There is nothing in the brief submitted by plaintiffs to indicate what evidence was offered by plaintiffs and improperly excluded, or what improper evidence was introduced on behalf of defendants, other than a reference to improper cross-examination in attempting to adduce testimony which plaintiffs contend was not within the issues before the Court. It is the contention of plaintiffs that no pleading alleged that plaintiffs had contributed to the intoxication of Tracy and thereby contributed to their own injuries so as to preclude them from recovery and that, therefore, evidence could not be introduced to prove that plaintiffs had contributed to their own injuries. There was no such objection in the Trial Court, other than on the ground that it was not proper cross-examination. The failure to make such objection on such ground specifically in the Trial Court prevents the assertion of such objection in this Court, even if otherwise well-founded (SHEARER vs. AURORA, ELGIN & CHICAGO R.R. CO., 200 Ill. App. 225). No other arguments were made in connection with any other evidence admitted or excluded. It is presumed that any such assignments of error are waived and abandoned under such circumstances.

It is contended, rather vigorously, that the Court below erred in giving certain instructions on behalf of defendants, which were misleading to the jury, under the facts and the evidence. The two instructions which were particularly objected to were identical as to the plaintiffs, and recited in substance that, before either of the plaintiffs could recover from defendants, Fehrenbacher and Albright, they must prove each of the following by a preponderance of the evidence: "No. 1. That at the time of the occurrence in question Hiram Tracy was in fact intoxicated. No. 2, that such intoxication was caused in whole or in part by alcoholic liquor sold or given to the said Hiram Tracy by the defendant... No. 3. That the injury of plaintiff .... was caused by such intoxication of Hiram Tracy, if you believe the said Hiram Tracy was in fact intoxicated, and <u>was not caused, occasioned or provoked by the said William Adkins himself</u>. If said plaintiff has failed to prove any one or more of the foregoing by a preponderance of the evidence then, under the law, you must find said defendants .... not guilty. ...." Ordinarily, the doctrine of contributory negligence is not applicable to a Dram Shop case (<u>LESTER vs. BUGNI</u>, 316 Ill. App. 19), but under the Dram Shop Act one who has contributed to the intoxication or his own injury may not recover (<u>HILL vs. ALEXANDER</u>, 321 Ill. App. 406; <u>JAMES vs. WICKER</u>, 309 Ill. App. 397). The complaining party must be free from complicity in procuring the intoxication.

Whether the plaintiffs in the instant case contributed to the intoxication of Tracy was, under the evidence, a question of fact for the jury. At the same time the burden was not, in the first instance, upon the plaintiffs to show affirmatively by a preponderance of the evidence that the plain-

tiffs had not contributed to such intoxication before plaintiffs were entitled to recover.

Two other instructions were given as to defendants, John C. Houchin and Stella H. Houchin, which sought to outline what plaintiffs were required to show by a preponderance of the evidence before plaintiffs could recover. In these instructions the recital "and was not caused, occasioned or provoked by ...." was omitted. Nevertheless, the jury found for such defendants, as well as the defendants, Fehrenbacher and Albright.

While the instructions containing the clauses placing such burden on plaintiffs were erroneous, it is not every erroneous instruction which requires a reversal. Under the facts and circumstances the error appears to have been harmless. As stated in the case of KAVANAUGH vs. WASHBURN, 320 Ill. App. 250 (at page 255), the "modern tendency favors a liberal application of the harmless error doctrine to instructions when it appears that the rights of the complaining party have been in no way prejudiced." And as indicated in the case of CHICAGO CITY RY. CO. vs. SHAW, 220 Ill. 532 (at page 536), "absolute accuracy with respect to instructions is a thing seldom to be obtained, and the Courts for want of it, should not set aside verdicts, unless such inaccuracy is of a character that the Court must feel was likely to have misled the jury." In view of the fact that other instructions which did not contain the erroneous characteristics as to two of the defendants resulted in similar verdicts, under the evidence it is difficult in the instant case to see how the jury could have been misled.

Other instructions which told the jury that it must take the law from the Court, as laid down in the instructions,

and to the effect that the complaint in itself was merely a statement of what plaintiffs alleged and was not to be taken as proof of the facts alleged therein were standard instructions and not erroneous. Similarly, the fact that eight of the instructions given to the jury concluded by telling the jury that under certain circumstances specified they should find defendants not guilty, does not constitute reversible error. While needless repetition should be avoided so that undue prominence should not be given to matters to which instructions relate, it does not appear in the instant case that the instructions dealing with the rights of two plaintiffs and four defendants, and which called for a certain amount of repetition, is ground for reversal (CARSON, PIRIE SCOTT & CO. vs. CHICAGO RAILWAYS, 309 Ill. 346).

We must, therefore, conclude that under the circumstances, while there was error in certain instructions, such instructions apparently did not mislead the jury and the erroneous character of such instructions could not justify a reversal. The verdicts of the jury were based upon evidence which could justify such verdicts. It cannot be said that the verdicts are contrary to the manifest weight of the evidence.

As we have indicated in this opinion, upon an examination of the record and the contentions of plaintiffs, we do not find error which would justify a reversal of this cause. The judgment of the Circuit Court of Jasper County will, therefore, be affirmed.

Judgment affirmed.

JUSTICES BARTLEY AND SMITH CONCUR.

ABSTRACT.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

October Term, A.D. 1946

Term No. 4606 Agenda No. 9

ASSOCIATES DISCOUNT CORPORATION, Plaintiff-Appellant, vs. WILLIAM FRYE, Defendant-Appellee.	)	Appeal from the Circuit Court of Madison County.

CULBERTSON, P. J.

This is an appeal from a judgment of the Circuit Court of Madison County, in favor of Appellee, WILLIAM FRYE (Hereinafter called defendant), and against Appellant, ASSOCIATES DISCOUNT CORPORATION (hereinafter called plaintiff), in bar of plaintiff's cause of action and against plaintiff for costs.

It appears from the evidence in this case that the defendant, William Frye, purchased an automobile on September 23, 1938, and in connection with the purchase thereof, he executed and delivered to the Wood River Motor Company, Incorporated, at Woodriver, Illinois, his promissory note in the amount of $367.20, and at the same time the note was executed, the parties executed a conditional sales contract for the purchase of the automobile, and on the same date the note and conditional sales contract were negotiated to the plaintiff in this case. Defendant was advised of the fact that his note and conditional

sales contract had been negotiated to the plaintiff and was given a coupon payment book and subsequently made two payments to plaintiff in accordance with the provisions of the note and contract. The defendant, after making two payments, defaulted, and on February 9, 1939 the automobile was repossessed and at the time it was repossessed there was a balance due in the amount of $321.30. The car was sold for $175.00 and the balance remaining due was in the amount of $146.30. Plaintiff, in December of 1944, took a judgment by confession in the Circuit Court of Madison County and subsequent to that garnishment proceedings were commenced and all but $12.28 of the principal balance had been collected at the time of the trial of this cause.

On the trial of this cause the defendant testified that at the time the car was repossessed, a representative of the plaintiff, named Mr. Miles, called at his home and asked him for either the car or all of the money due, and that there was also another man present with Mr. Miles at the time. Defendant testified that he had told Mr. Miles that he didn't have the money and Mr. Miles told him he would have to have the car, and defendant contends that Mr. Miles told him he would be released from further payments. This evidence is supported by the testimony of the wife of the defendant, who was present at the time Mr. Miles came to repossess the car and heard the statement made by Mr. Miles as testified to by the defendant. Mr. Miles on the trial of the cause denied having made the statement that defendant would be released from further payments.

It is contended on this appeal that the Court erred in refusing to direct a verdict in favor of plaintiff at the close of all the evidence. With this contention we cannot agree.

It is further assigned as error that the Court erred in refusing to give the instruction tendered by plaintiff. We

have examined the instruction against which complaint is made and we do not believe that the Court committed any error in refusing to give it.

The other assignment of error made may be fairly summarized as contending that defendant failed to prove the existence of a valid agreement for the cancellation of his indebtedness and that the person with whom the alleged contract was entered into was the agent of the plaintiff, or that said agent had authority to enter into said agreement, and that defendant failed to prove that there was any consideration for the alleged contract between plaintiff and defendant. We believe that on these issues there was tendered to the jury for its determination an issue of fact and the jury having decided that issue of fact adversely to the contention of the plaintiff we are not disposed to disturb it as we believe that it has abundant support in the evidence to be sustained and that the jury could well have adopted the contention of defendant, as they did by their verdict.

There being no reversible error in this case the judgment of the Circuit Court of Madison County is hereby affirmed.

JUDGMENT AFFIRMED.

Justices Bartley and Smith concur.

Abstract

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

OCTOBER TERM

A. D. 1946

Term No. 4603 Agenda No. 3

THEOPHIL RIESO, Plaintiff-Appellant	)	Appeal from the
vs.	)	Circuit Court of
IRENE RIESO, Defendant-Appellee	)	St. Clair County

BARTLEY, J.

Theophil Rieso, Plaintiff-Appellant, hereinafter referred to as Plaintiff, filed suit for divorce against his wife, Irene Rieso, Defendant-Appellee, hereinafter referred to as Defendant. He charged her with extreme and repeated cruelty. There was a trial before the Court without a Jury and the Chancellor found the issues for the Defendant and dismissed Plaintiff's complaint for want of equity.

This is an Appeal by Plaintiff to review the Decree of the Circuit Court. Plaintiff claims that the Decree is against the manifest weight of the evidence. The only question before the Court in this case, as set out by Plaintiff in his Brief, is: Was the Defendant guilty of such extreme and repeated cruelty as to entitle Plaintiff to a Divorce?

Plaintiff, in his Complaint, charged that on November 15, 1944, Defendant struck him several blows about the face and body causing him to fall against a bathtub and be injured

and that on June 10, 1945, the Defendant struck him several blows about his face and body with her fists; that during the two years prior to the filing of the suit, the Defendant had on at least an average of two times per month, struck him with her hands and fists. Defendant filed her Answer in which she denied each and every act of cruelty.

They were married on September 6, 1921 and lived together until June 28, 1945. There were two children born of the marriage, a son, seventeen years old at the time of trial, and a daughter, twelve years old. The parties were farmers and after their separation on June 28, 1945, the date on which Plaintiff left home, the mother continued to reside in the house with the daughter and Plaintiff lived elsewhere with the son.

In regard to the acts of cruelty, Plaintiff testified that on the evening of November 26, 1944, he and the Defendant and their daughter, in the company of some neighbors, attended a dance in Belleville; that while at the dance, Defendant became angry with Plaintiff, because she claimed that he was fooling around with a blonde; that she told him that she would fix him when she got him home; that when they returned home and got into the house and as soon as the door was closed so no one would hear them, she started to argue and as he was sitting on the edge of the bathtub in the bathroom, she cussed and beat him; that she beat him on the back with her fists so he could not move and threw him in the bathtub; that he was helped out of the tub by his son; that his back was sprained for several days thereafter. He stated that on the Monday following the 26th of November, he was sick and that after he had been at the cow barns all morning and had everything ready for Defendant's washing, he went to bed; that the Defendant was in

the kitchen and she cussed him one time after another and that before he could get out of bed, she jumped on him and hit him with her fists. He stated that in June of 1945, Defendant called him a dirty old hound and stated that she would take his brain out even if he didn't have one and that at that time, she threw things at him and hit him; that lots of times she hit him on the back of the head; that she threw a cup at him but never hit him with it; that when he didn't get home in time, she got angry and started throwing things at him; that this happened quite often.

Ellard Rieso, the son, testified for his father. In regard to the bathtub incident, he stated that when he came home, his father was in the bathtub; that he picked him up and got him out and his father then said that Defendant threw him in the bathtub; that he didn't see her do it; that Defendant, at the time, said that she could kill the Plaintiff and that she wished she could kill him, so that he could not say anything; that Defendant struck the Plaintiff on many occasions and that everytime Defendant got into an argument, she would lose her temper; that she used profane language about two or three times a week.

Three other witnesses testified for Plaintiff; none of them had seen Defendant strike the Plaintiff, but they stated that the Defendant admitted that the separation was because of her fault and that she pushed him and treated him rough.

Defendant, in her testimony, denied that she ever struck the Plaintiff causing him to fall backwards into the bathtub and stated that she got mad when Plaintiff was dancing with another woman at the dance, but that she didn't say anything to Plaintiff about it and that when they reached home, she undressed and went to bed and that the daughter, Marylin, was sleeping in

the same room; that nothing happened that night and that their son did not get home until around 2:00 A. M.; that they had gotten home about 12:00 midnight. She denied that she struck him on any occasion; she also denied that she threw any cups or dishes; and also denied that she admitted to any person that they were separated because of her fault. She stated that the boy made the trouble in their home.

Marylin Rieso, the daughter, testified for her mother and stated that on the night of the dance, nothing happened when they came home; that they went to bed; that she slept in the same room with her father and mother and that her mother never hit her father; that she never hit him that night or any other night.

Several other witnesses appeared for the Defendant. Their testimony was along the line, that Defendant was a good housewife and cook and conducted herself properly and that Plaintiff and Defendant got along without any difficulty and that there were no arguments.

It appears that the Plaintiff is five feet, eight inches tall and 140 pounds in weight. His wife is five feet tall and at the time of the alleged acts of cruelty, weighed 95 pounds.

"Cruelty constituting ground for divorce under the Statute, means physical acts of violence, bodily harm or suffering, or such acts as endanger life or limb or such as raise a reasonable apprehension of great bodily harm". (Wesselhoeft v. Wesselhoeft, 369 Ill. 419)

The degree of proof required to substantiate the charge of extreme and repeated cruelty is the same as in all other cases of a civil nature. The Plaintiff is required to prove his case by a preponderance of the evidence. (Teal v. Teal, 324 Ill. 207; Lenning v. Lenning, 176 Ill. 180)

There is a conflict in the testimony concerning the alleged acts of cruelty. The Plaintiff is supported by his son in proving the acts of cruelty alleged and the Defendant is supported by her daughter in denying the charged acts of cruelty. There are no other witnesses who saw the Defendant strike the Plaintiff. The testimony concerning admissions made by the Defendant of her guilt are denied by the Defendant. The Chancellor heard the witnesses and saw them as they testified and had the opportunity to weigh their testimony and we do not feel, in examining the record, that his decision was against the manifest weight of the evidence. It is the rule that the Chancellor's findings will not be disturbed unless the Decree is clearly against the weight of the evidence. (Floberg v. Floberg, 358 Ill. 626; Shlensky v. Shlensky, 369 Ill. 179; Hitchcock v. Hitchcock, 373 Ill. 352)

We find that the Decree is not against the weight of the evidence and that there is no reversible error in the record. The Decree of the Circuit Court of St. Clair County is hereby affirmed.

AFFIRMED.

Judges Culbertson and Smith concur

Not to be published in full

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

OCTOBER TERM

A. D. 1946

Term No. 46, 011

LOUIS THOMPSON, Plaintiff-Appellee, vs. ARDELL CHEATEM, Defendant-Appellant.	Appeal from the City Court of East St. Louis, Illinois

Smith, J.

This cause is an appeal from the City Court of East St. Louis, Illinois, heard by the Court without a jury. The Court found the issues for the Plaintiff-Appellee, Louis Thompson, hereinafter called the Plaintiff, and against the Defendant-Appellant, Ardell Cheatem, hereinafter called the Defendant.

There is no dispute between the parties as to the amount of damages, as they are covered by a stipulation.

The Plaintiff had parked his car in the street in front of his residence at 519a State Street in the City of East St. Louis, on or about April 7, 1943. The car was struck during the night and damaged but the Plaintiff did not know of the accident until the next morning.

The evidence shows that the Plaintiff talked with the Defendant at the scene of the accident, soon after discovering that his car had been damaged. The Defendant then admitted that his car had struck and damaged the Plaintiff's

car, after the Defendant's car had been hit by another car, and the Defendant informed the Plaintiff that the damages to the Plaintiff's car would be paid.

The Defendant bases his appeal on the grounds that there is no evidence in the record to sustain the Plaintiff's case.

We cannot agree with the Defendant's contention. It appears from the Defendant's testimony that his car was struck on the left side, the collision taking place about the center of the intersection of Sixth and State Streets; that he applied his brakes; pulled to the right; travelled 10 feet and struck the Plaintiff's car; that he was travelling between 20 and 30 miles per hour, where the speed limit was 25 miles per hour, and that the Plaintiff's car was parked 10 or 15 feet from the corner. The Plaintiff testified that his car was knocked 3 or 4 feet by the collision.

The Defendant refers to various sections of the Motor Vehicle Act and attempts to show that Lamarr's violation of these sections, caused the collision which resulted in the Defendant's car colliding with the car of the Plaintiff. However, while Lamarr may have been negligent, the Defendant has failed to completely absolve himself from negligence.

If the Plaintiff's car was parked 10 or 15 feet from the corner and the Defendant's car was struck in the center of the intersection, the Defendant's car would have had to travel a much greater distance than 10 feet to strike the Plaintiff's car. Furthermore, if the Defendant applied his brakes, in addition to the natural slowing effect, which the impact of Lamarr's car would have caused, and yet the Defendant's car knocked the Plaintiff's parked car 3 or 4 feet, the Defendant's car would necessarily have been travelling at a high rate of speed.

The Defendant admitted he was travelling between 20 and 30 miles per hour and he naturally made his estimate of his speed most favorable to his defense. The speed limit at this intersection was 25 miles per hour. The Defendant's statement that his car struck the Plaintiff's car and that the Plaintiff's car would be taken care of was an admission by the Defendant which the trial Court was justified in considering with other evidence of negligence.

The Defendant was the only eye witness to the accident to testify and because of the inconsistent statements in his testimony, this Court would not be in a position to substitute its judgment for that of the trial court. We are unable to say from the evidence that the Defendant was without fault. The trial Court had the advantage of seeing and observing the witnesses as they testified and was thus enabled to weigh the evidence and adjudge the merits of the cause. This Court will not set aside a judgment entered by a trial Judge unless it is against the manifest weight of the evidence. (Coleman v. Hait 293 Ill. App. 615)

The judgment of the trial Court is affirmed.

Judgment affirmed.

Justices Culbertson and Bartley concur.

Abstract.

43448

JACOB KOLECZ, Appellant, v. CHICAGO SURFACE LINES, Appellee.	)	APPEAL FROM SUPERIOR COURT COOK COUNTY.

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is an action to recover damages for personal injuries sustained by plaintiff, resulting from the alleged negligent operation of defendant's street car. There was a jury trial and verdict and judgment for $4500. After the entry of the judgment defendant's motions for judgment notwithstanding the verdict and, in the alternative, for a new trial were allowed. Plaintiff appeals.

The gist of the complaint is that plaintiff was standing on a street car loading platform, intending to board a street car; that defendant permitted its street car to become overcrowded so that passengers were standing on the rear platform and the steps thereof; and that after being brought to a stop at the loading platform the street car was started with a violent jerk, causing various passengers standing on the rear steps to be thrown therefrom into and upon the person of the plaintiff.

T he record discloses the following facts. On December 14, 1943 at about 4:15 p.m. plaintiff, an employee of International Harvester Co., was standing on a safety island located near the southeast corner of Western Avenue and 28th Street in the City of Chicago and waiting for a northbound Western Avenue street car. The safety island in question was about sixty feet long and four feet wide. At the time of the occurrence many other employees of the Harvester company, estimated at from fifteen to fifty, had

43448

JACOB KOLECE, Appellant, v. CHICAGO SURFACE LINES, Appellee.	APPEAL FROM SUPERIOR COURT COOK COUNTY.

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is an action to recover damages for personal injuries sustained by plaintiff, resulting from the alleged negligent operation of defendant's street car. There was a jury trial and verdict and judgment for $5000. After the entry of the judgment defendant's motions for judgment notwithstanding the verdict and, in the alternative, for a new trial were allowed. Plaintiff appeals.

The gist of the complaint is that plaintiff was standing on a street car loading platform, intending to board a street car; that defendant permitted its street car to become overcrowded so that passengers were standing on the rear platform and the steps thereof; and that after being brought to a stop at the loading platform the street car was started with a violent jerk, causing various passengers standing on the rear steps to be thrown from-from into and upon the person of the plaintiff.

The record discloses the following facts. On December 14, 1942 at about 4:15 p.m. plaintiff, an employee of International Harvester Co., was standing on a safety island located near the southeast corner of Western Avenue and 59th Street in the City of Chicago and waiting for a northbound Western Avenue street car. The safety island in question was about sixty feet long and four feet wide. At the time of the occurrence many other employees of the Harvester company, estimated at from fifteen to fifty, had

gathered on the safety island. As a northbound street car neared 28th Street its rear platform was crowded and many passengers were standing on the rear steps. Upon the street car reaching the safety island, some person whose identity was not established attempted to board the street car and was holding on to a "grab iron" as he stood on the rear steps. The street car suddenly moved forward and the body of this unknown passenger struck one of the men in the group of persons who had congregated on the safety island, causing him to fall back against other persons to the rear of him; thus in rapid succession five or six men were knocked down, the plaintiff being among them.

The record further discloses that the order granting defendant's motion for judgment notwithstanding the verdict, and the motion in the alternative for a new trial, was entered on December 1, 1944, and that plaintiff's notice of appeal was filed on December 6, 1944. Subsequently other proceedings were had which we shall consider later.

Plaintiff contends that the trial court erred (1) in granting defendant's motion for judgment notwithstanding the verdict; and (2) in entering the order granting defendant's motion for a new trial in the alternative.

Plaintiff and one Joseph Poplowski, a fellow employee, were the only occurrence witnesses. Both of them appeared to have language difficulties and the latter gave his testimony through an interpreter. Poplowski testified substantially as follows: That plaintiff and the witness were employed as moulders in the same department of the International Harvester Company and had known each other for about twenty-five years; on the afternoon of the occurrence the witness was standing on the safety island waiting for a northbound Western Avenue car; when the street car reached 28th

gathered on the safety island. As a northbound street car neared 28th street its rear platform was crowded and many passengers were standing on the rear steps. Upon the street car approaching the safety island, some person whose identity was not established attempted to board the street car and was holding on to a "grab iron" as he stood on the rear steps. The street car suddenly moved forward and the body of this unknown passenger struck one of the men in the group of persons who had congregated on the safety island, causing him to fall back against other persons in the rear of him; thus in rapid succession five or six men were knocked down, the plaintiff being among them.

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Plaintiff contends that the trial court erred (1) in granting defendant's motion for judgment notwithstanding the verdict; and (2) in entering the order granting defendant's motion for a new trial in the alternative.

Plaintiff and one Joseph Jozlowski, a fellow employee, were the only occurrence witnesses. Both of them connected to have language difficulties and the latter gave his testimony through an interpreter. Jozlowski testified substantially as follows:

That plaintiff and the witness were employed as sanitary in the same department of the International Harvester Company and knew each other for about twenty-five years; on the afternoon of the occurrence the witness was standing on the safety island waiting for a northbound Western Avenue car; when the street car reached 27th

Street it "slowed down"; "One man grabbed the grab iron and the car jerked fast; that man hit other man with his back and about six men fell down; that man falls and this man falls on Kolaez" (plaintiff); that there were many people on the safety island, "maybe about fifty men"; that plaintiff was standing "about three feet away from the edge nearest the tracks." On cross-examination the witness stated that "one man tried to get on the back and hit another man when the car started fast. This man grabbed and was standing on the step and hit another man. The car kept on going. The street car came to a dead stop and started right off again. No it didn't stop; the street car slowed down and started up faster. I see one man get on that street car; I don't know who he was; it was kind of young man; he is the one that knocked down my friend and the six or seven other men that were standing on the safety island."

Plaintiff testified that he was standing about two feet from the edge of the island and that fifteen or sixteen other people were also standing there; "the car came by, slowed down and stopped a second and started out fast and went on; the people fell over; one of the men knocked me into the street; I don't know if anybody got on; about five people fell off the step on the platform; one of them hit me and I fell in the street; five of them that were on the island fell off; I don't know if anybody fell off the street car." On cross-examination plaintiff testified: "I could see it (street car) coming from 29th Street; there were men standing on the platform and the steps; then the car stopped for a second at 28th Street; several tried to get on the steps and platform; I don't know whether these were the men that knocked me down as the car started off; I was standing five or six feet away from the car when it stopped

and started again; other people were standing in front of me; there were no people in back of me; the fellow that fell on top of me took the car number; I do not have his name; I don't know where he lives."

Joseph Wasik, a motorman, called by the defendant testified that at the hour of the occurrence a great many employees usually congregated at the safety island; and that he knew nothing of the accident until three months before the trial. On cross-examination the witness stated, "I made a stop at 28th Street and Western Avenue; I know this because we stop there all the time; my car was crowded." On re-cross examination he testified that when the street car reached 28th Street it was about six minutes late.

In commenting on the evidence the trial judge said: "On a retrial of this case my guess would be that you would get an interpreter that would make it more distinct to the jury as to just what did happen. However, this is a matter to be determined later on. I can't let this verdict stand."

The rule is well established that on a motion for judgment notwithstanding the verdict the question of law to be determined by the court is whether there is any evidence which, when standing alone and taken with its inferences most favorable to the plaintiff, tends to support his case charged in the complaint. (Osborn v. Leuffgen, 381 Ill. 295, 296; Froehler v. No. American Life Ins. Co., 374 Ill. 17; Walaite v. Chicago, R. I. & P. Ry. Co., 306 Ill. App. 5; Cooper v. Safeway Lines, Inc., 304 Ill. App. 302.)

Defendant's counsel argue that "Poplowski said repeatedly that the man grabbed while the street car was in motion. Therefore there is no room in this record for the theory expressed in plaintiff's brief that the man attempted to board while the street car was standing still and that it was started while he was doing so."

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Joseph Vaik, a motorman, called by the defendant testified that at the hour of the occurrence a great many employees usually congregated at the safety island; and that he knew nothing of the accident until three months before the trial. On cross-examination the witness stated, "I made a stop at 65th Street and Lexington Avenue; I know this because we stop there all the time; my car was crowded."

On re-cross examination he testified that when the street car reached 65th Street it was about six minutes late.

In commenting on the evidence the trial judge said:

"On a retrial of this case my guess would be that you would get an interpreter that would make it more distinct to the jury as to just what did happen. However, this is a matter to be determined later on. I can't let this verdict stand."

The rule is well established that in a motion for judgment notwithstanding the verdict the question of law to be determined by the court is whether there is any evidence which, when stripped alone and taken with its inferences most favorable to the plaintiff, tends to support his case charged in the complaint. (Lehrer v. Lustgarten, 281 NY. 286, 288; Kuchler v. So. Brooklyn City Ins. Co., 274 NY. 17; Colotta v. Ohlsens, N. Y. & L. Ry. Co., 305 NY. 1, 4; Cooper v. Delaware Lines, Inc., 304 NY. App. 302.)

Defendant's counsel argue that "Coslowski said repeatedly that the man grabbed while the street car was in motion. Therefore there is no room in this record for the theory expressed in plaintiff's brief that the man attempted to board while the street car was standing still and that it was started while he was doing so."

Plaintiff and Wasik, the motorman, both testified that the street car did stop when it reached the safety island at 28th Street. Because of Poplowski's inability to express himself his testimony is confusing, but he did say that the street car came to a dead stop and that "one man tried to get on the back and hit another man when the car started fast." Obviously the jury understood this statement to mean that the unknown passenger boarded the street car while it stopped and that the accident occurred immediately afterwards when it "started fast." In Turner v. Cummings, 319 Ill. App. 225, 229, the court in adverting to the case of Plodzien v. Segool, 314 Ill. App. 40, said the law is that where "uncertainty arises as to the inferences that may legitimately be drawn from the evidence so that fair-minded men may honestly draw different conclusions, the question is not one of law but one of fact to be settled by the jury."

Although the instant case is not a "passenger case", as conceded by plaintiff, defendant did owe a duty to plaintiff to exercise ordinary care. Plaintiff was lawfully at a place which defendant used in receiving and discharging its passengers.

There is evidence that defendant's negligence in starting the street car with a violent jerk caused the unknown passenger to strike one of the persons on the safety island. Whether this was the proximate cause which set in motion the chain of circumstances leading to plaintiff's injuries was a question of fact to be determined from all the attending circumstances. (Merlo v. Public Service Co., 381 Ill. 300, 318.)

In the case at bar we cannot say that reasonable men could not differ as to the inferences that may legitimately be drawn from the evidence.

Plaintiff and Frank, the motorman, both testified that the street car did stop when it reached the safety island on 26th Street. Because of Dogiewski's inability to recover himself (his testimony is confusing, but he did say that the street car came to a dead stop and that "one was trying to get on the line and hit another man when the car started last.") Particularly the jury understood this statement to mean that the motorman negligently boarded the street car while it stopped and that the resulting concussion immediately afterwards came in "abnormal fact." In Lowery v. Cunningham, 219 Ill. App. 609, 612, the court is answering to the case of Fleming v. Chapman, 214 Ill. App. 58, said the law is that where "uncertainty arises as to the inferences that may legitimately be drawn from the evidence as that fair-minded men may honestly draw different conclusions, the question is not one of law but one of fact to be settled by the jury."

Although the instant case is not a "passenger case", as provided by plaintiff, reasonable minds are a long to plaintiff in exercise ordinary care. Plaintiff was boarding at a place which defendant used in receiving and discharging its passengers.

There is evidence that defendant's negligence in alighting the street car with a violent jerk caused the motorman negligently strike one of the passengers on the safety island. Further this was the proximate cause which set in motion the chain of circumstances leading to plaintiff's injuries was a question of fact to be determined from all the attending circumstances. (Lucia v. Chicago Railway Co., 281 Ill. App. 612.)

In the case at bar we cannot say that reasonable men could not differ as to the inferences that may legitimately be drawn from the evidence.

From a careful reading of the record we think there was evidence tending to establish all the essential elements of plaintiff's cause of action as alleged in the complaint, and that the court erred in granting defendant's judgment notwithstanding the verdict.

As for plaintiff's second contention, the record discloses that the order granting defendant's motion for judgment notwithstanding the verdict and motion in the alternative for a new trial was entered December 1, 1944; that plaintiff's notice of appeal was filed December 6, 1944; that on December 11, 1944 plaintiff filed a motion to vacate the order of December 1, 1944. Subsequently on December 15, 1944 the trial court entered another order granting defendant's motion for judgment notwithstanding the verdict and in the alternative for a new trial. This order followed the language of the first order verbatim. On March 9, 1945 plaintiff filed an amended notice of appeal from the order entered on December 15, 1944. The law is well established that the jurisdiction of the Appellate Court attaches when notice of appeal is filed in the trial court. (Francke v. Madie, 373 Ill. 500, 502; Kohler v. Kohler, 326 Ill. App. 105, 111; Cowdery v. Northern Trust Co., 321 Ill. App. 243,268; Bollaert v. Kankakee Tile and Brick Co., 317 Ill. App. 120. 122.) When the notice of appeal was filed on December 6, 1944 the appeal was perfected, and the subsequent order of December 15, 1944 is void, since the same case cannot be before the trial court and the reviewing court at the same time. For the same reason the "amended notice of appeal" purporting to appeal from the order of December 15, 1944 is also void.

It appears from the first notice of appeal, filed on December 6, 1944, that plaintiff "requests that judgment notwithstanding the verdict . . . be reversed. . ." That part of the

From a careful reading of the record we think there was evidence tending to establish all the essential elements of plaintiff's cause of action as alleged in the complaint, and that the court erred in granting defendant's judgment notwithstanding the verdict.

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It appears from the first notice of appeal, filed on December 6, 1944, that plaintiff "requests that judgment notwithstanding the verdict . . . be reversed. . ." That part of the

order of December 1, granting defendant's alternative motion for a new trial, was not specified or described in this notice of appeal. Nor was any attempt made by plaintiff to amend its notice of appeal in accordance with section 5 of rule 33 of the Supreme Court. Therefore the question is not preserved for review on this appeal.

For the reasons stated, that part of the order granting defendant's motion for judgment notwithstanding the verdict is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED
FOR NEW TRIAL.

KILEY, J. CONCURS.

BURKE, J. SPECIALLY CONCURRING:

I am of the opinion that until there is a supersedeas the trial court has jurisdiction to the same extent as before the appeal.

order of December 1, granting defendant's alternative motion for a new trial, was not specified or described in this notice of appeal. Nor was any attempt made by plaintiff to amend its notice of appeal in accordance with section 2 of rule 30 of the Supreme Court. Therefore the question is not presented for review on this appeal.

For the reasons stated, that part of the order granting defendant's motion for judgment notwithstanding the verdict is reversed and the cause is remanded for a new trial.

Judgment affirmed.

BLACK, J., dissenting.

DOCKS, J., specially concurring:

I am of the opinion that until there is a supersedeas the trial court has jurisdiction to the case retained as before the appeal.

43554

330 ILL. APP.

ROBERT E. PRILL, Appellant,	)	APPEAL FROM
v.	)	SUPERIOR COURT
ERNEST MAGRUDER, Appellee.	)	COOK COUNTY.

330 I.A. 430

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiff seeks to reverse a decree dismissing for want of equity his complaint for an accounting based upon an alleged oral partnership agreement.

The gist of the complaint is that on June 22, 1944 the parties entered into an agreement to engage in the business of light manufacturing and welding under the firm name of "Practical Welding & Engineering Company"; that plaintiff make all sales and business contacts, and establish credit; that defendant conduct and manage the business, and that all profits and losses be shared equally. Defendant answering denies entering into a partnership agreement as alleged, and avers that he is the sole owner of the business.

By the decree the chancellor found, among other things, that plaintiff has not maintained the allegations of the complaint.

The question presented is whether the evidence proves the existence of a partnership between the parties.

It appears that plaintiff's employers, Industrial Metal Fabricators, had obtained a large order for metal bomb boxes from a governmental agency, which it parceled out among subcontractors. As chief engineer and coordinator for Industrial Metal Fabricators it was plaintiff's duty to investigate small manufacturing plants for the purpose of determining their ability to make bomb boxes,

42554

ROBERT E. PHILL, Appellant, v. ERNEST MAGNUSSEN, Appellee.	APPEAL FROM SUPERIOR COURT COOK COUNTY.

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiff seeks to reverse a decree dismissing for want of equity his complaint for an accounting based upon an alleged oral partnership agreement.

The gist of the complaint is that on June 22, 1944 the parties entered into an agreement to engage in the business of light manufacturing and welding under the firm name of "Practical Welding & Engineering Company"; that plaintiff made all sales and business contacts, and established credit; that defendant conduct and manage the business, and that all profits and losses be shared equally. Defendant answering denies entering into a partnership agreement as alleged, and avers that he is the sole owner of the business.

By the decree the chancellor found, among other things, that plaintiff has not maintained the allegations of the complaint.

The question presented is whether the evidence proves the existence of a partnership between the parties.

It appears that plaintiff's employers, Industrial Metal Fabricators, had obtained a large order for metal bomb boxes from a governmental agency, which it parceled out among subcontractors. As chief engineer and coordinator for Industrial Metal Fabricators it was plaintiff's duty to investigate small manufacturing plants for the purpose of determining their ability to make bomb boxes,

thus ensuring performance by plaintiff's employer as prime contractor of its contracts within the period specified therein.

Plaintiff testified substantially as follows: In June, 1944 defendant called on plaintiff seeking employment and at that time defendant asked plaintiff if he would join him as a partner in a "welding concern". After several discussions they agreed to form a partnership in which plaintiff's duties "were primarily getting business and assisting in the operation of the business from an advisory standpoint, setting up fixtures and production lines." Later plaintiff assisted defendant in finding a factory site and obtained equipment for the plant. Plaintiff further testified that he selected the name "Practical Welding & Engineering Company", and that the business actually commenced about August 1, 1944 and terminated about March 21, 1945. During this period plaintiff conferred with defendant on many occasions on evenings, Saturdays and Sundays; that his wife typed letters and made invoices. At the end of every month defendant displayed to plaintiff canceled checks and the bank statement for the month and accounted for the income and expenses of the business. Defendant borrowed $1,000 from one Homer C. Hull for use in the business. Subsequently, to repay this loan defendant borrowed an equal sum from plaintiff's mother-in-law, Mrs. Harris. In order to obtain this $1,000 loan from Mrs. Harris, plaintiff had defendant execute a note for $2,000. This note plaintiff admits was paid in full by defendant in 60 days. From January 15, 1945 to April 1, 1945 plaintiff spent most of his time in California. On April 1, 1945 defendant stated to plaintiff he would divide "our moneys after the income taxes and employment compensation benefits."

thus ensuring performance by plaintiff's employer as prime contractor of its contracts within the period specified therein.

Plaintiff testified substantially as follows: In June, 1944 defendant called on plaintiff seeking employment and at that time defendant asked plaintiff if he would join him as a partner in a "welding concern". After several discussions they agreed to form a partnership in which plaintiff's duties "were primarily getting business and assisting in the operation of the business from an advisory standpoint, getting up figures and production lines." Later plaintiff assisted defendant in finding a factory site and obtained equipment for the plant. Plaintiff further testified that he selected the name "Practical Welding & Engineering Company", and that the business actually commenced about August 1, 1944 and terminated about March 31, 1946. During this period plaintiff conferred with defendant on many occasions on evenings, Saturdays and Sundays; that his wife typed letters and made invoices. At the end of every month defendant displayed to plaintiff canceled checks and the bank statement for the month and accounted for the income and expenses of the business. Defendant borrowed $1,000 from one Homer C. Hull for use in the business. Subsequently, to repay this loan defendant borrowed an equal sum from plaintiff's mother-in-law, Mrs. Morris. In order to obtain this $1,000 loan from Mrs. Morris, plaintiff had defendant execute a note for $2,000. This note plaintiff admits was paid in full by defendant in 26 days. From January 15, 1945 to April 1, 1945 plaintiff spent most of his time in California. On April 1, 1945 defendant stated to plaintiff he would divide "our money after the income taxes and employment compensation benefits."

Arthur Workmaster, called as a witness by plaintiff, testified that he was related to plaintiff and employed by him at Practical Welding & Engineering Company from the second week in December, 1944 to the last week in January, 1945, when defendant discharged him; that on two different occasions at the Prill home he heard defendant state that plaintiff was a partner at Practical Welding & Engineering Company.

Violet Prill, plaintiff's wife, testified that she worked at home for Practical Welding & Engineering Company, "making out invoices, taking care of delivery slips and making out letters"; that some time in August, 1944, at the witness's home, defendant said, "Half of anything I make in this business is Bob's," meaning plaintiff; that during August, 1944 to January 1, 1945 defendant came to plaintiff's home many times to discuss the business of Practical Welding & Engineering Company, and that on November 15, 1944 there was a discussion between Hull, plaintiff, and defendant with reference to giving Hull a one-fifth interest in the business; and that her husband, the plaintiff, told her that $200 she had advanced to defendant was an investment in the business.

George Squires, called by plaintiff, testified in substance that in July or August, 1944, plaintiff signed an order for equipment sold to Practical Welding & Engineering Company; that the down payment was made by defendant; that the witness did not demand any money from plaintiff because it was agreed that the balance would be paid by defendant.

Clyde L. Todd, an attorney, testified in behalf of plaintiff that on December 28, 1944, at plaintiff's request, he came to "Prill's home for the purpose of getting information with reference to incorporating the business which he and Magruder were operating." During the discussion both parties stated that they

Arthur Wadsworth, called as a witness by plaintiff, testified that he was related to plaintiff and employed by him in Practical Building & Engineering Company from the second week in December, 1944 to the last week in January, 1945, when defendant discharged him; that in the afternoon conversation at the Field home he heard defendant state that plaintiff was a partner in Practical Building & Engineering Company.

Violet Field, plaintiff's wife, testified that she worked at home for Practical Building & Engineering Company, "taking out invoices, taking care of delivery slips and making out letters"; that once then in August, 1944, in the witness's home, defendant said, "Half of everything I make in this business is yours," meaning plaintiff; that during August, 1944 to January 1, 1945 defendant gave to plaintiff's housekeeper three to eleven the earnings of Practical Building & Engineering Company, and that on December 12, 1944 there was a discussion between Bill, plaintiff, and Raymond with reference to giving Bill a one-fifth interest in the business; and that her husband, the plaintiff, told her that Bill had attempted to defendant was an investment in the business.

George Tucker, called by plaintiff, testified in substance that in July or August, 1944, plaintiff stated to other employees that Bill is Practical Building & Engineering Company; that the payroll was made by defendant; that the witness did not consider money from plaintiff because it was agreed that the salaries would be paid by defendant.

Clyde L. Todd, an attorney, testified in behalf of plaintiff that on December 27, 1944, at plaintiff's request, he came to Field's home for the purpose of getting information with reference to incorporating the business which he and Taylorcraft were starting. During the discussion both parties stated that they

had an equal interest in Industrial Metal Fabricators' contract; and that plaintiff stated to witness that he was a partner in Practical Welding & Engineering Company, and that in the event of incorporation 500 shares would be issued which would be divided equally.

C. B. Nielsen, called by plaintiff, testified that he was president of Mid-States Equipment Manufacturing Corporation which furnished some of the equipment used by Practical Welding & Engineering Company; that there were two purchase orders for the equipment in question, one of which was signed by plaintiff and another by defendant; that when the account ran behind witness contacted defendant.

Harvey Stein, called as a witness for plaintiff, testified that he was a director of Industrial Metal Fabricators, plaintiff's employer; that plaintiff was an engineer and outside contact man and "did investigate on subcontracting work; that between the 1st and 15th of November, 1944 plaintiff told witness that a small concern was looking for subcontracting" and "that he was interested in seeing that an order was placed with Practical Welding & Engineering Company"; "Mr. Prill informed me that he would work at that company and assist in every respect he could"; that "he would work there after hours"; and "this contract was given on Prill's statement that he had an interest in the company".

Homer C. Hull testified by deposition, in behalf of defendant, stating that he resided in Indianapolis, Indiana, and was a heating engineer; that during November, 1944 he appeared at plaintiff's home with reference to a loan of $1,000; that during the discussion Mrs. Prill was out of the room; that Prill (plaintiff) did not state that he was a partner of defendant; that the witness

had an equal interest in Industrial Metal Fabricators' contract; and that plaintiff stated to witness that he was a partner in practical welding & Engineering Company, and that in the event of incorporation 500 shares would be issued which would be divided equally.

G. T. Wilson, called by plaintiff, testified that he was president of Mid-States Industrial Manufacturing Corporation which furnished some of the equipment used by Practical Welding & Engineering Company; that there were two purchase orders for the equipment in question, one of which was signed by plaintiff and another by defendant; that when the account was sued witness contacted defendant.

Harry Stein, called as a witness for plaintiff, testified that he was a director of Industrial Metal Fabricators, plaintiff's employer; that plaintiff was an engineer and outside contact man and "did investigate an advertising work; that between the 1st and 15th of November, 1954 plaintiff told witness that a small concern was looking for advertising" and "that he was interested in seeing that an order was placed with Practical Welding & Engineering Company"; "Mr. Prill informed me that he would work at that company and assist in every respect he could"; that "he would work there after hours"; and "this contract was given on Prill's statement that he had an interest in the company".

Homer C. Hull testified by deposition, in behalf of defendant, stating that he resided in Indianapolis, Indiana, and was a heating engineer; that during November, 1954 he discussed of plaintiff's name with reference to a loan of $1,000; that during the discussion Mr. Prill was out of the room; that Prill (plaintiff) did not state that he was a partner of defendant; that witness

never indicated to defendant in the presence of plaintiff that "I was interested in getting some control of Practical Welding & Engineering Company in consideration of this $1,000" (loan).

Leona Magruder testified in substance that she was employed as a welder for three months in Practical Welding & Engineering Company; that she never saw plaintiff show any employee how to do work in the shop, nor did plaintiff tell her that he had an interest in the company; and that visits at plaintiff's home were social calls and no business was discussed there.

Defendant testified that the lease on the factory site, application for electric power, and application for telephone service were signed by him alone; and that he established the bank account and never had any conversation with plaintiff about the name of the company. Defendant further testified: "I spoke to Prill in the latter part of October, 1944 about bomb boxes; we finally agreed that I could handle about 3500; I spoke to Prill on numerous occasions, trying to find out why the material did not get to me." Defendant also denied having any discussion with plaintiff relative to the formation of a partnership. He testified that he made application to the Collector of Internal Revenue for a registration number for withholding and social security taxes through Frank Butterfield, his accountant, and that Butterfield "set up my books"; that in April, 1945 plaintiff "requested $200 that his wife loaned me"; that "he also wanted to see my books"; that plaintiff had never informed him that he had spent any money of his own on small equipment, nor did he ever hold himself out as a partner in his presence or talk with him about dividing profits; and that the note which plaintiff asserts he executed in favor of Mrs. Harris for $2,000 in consideration of a loan for $1,000 was not executed by plaintiff in his presence and that the first time defendant knew of its terms was when he signed the note.

never indicated to defendant in the presence of plaintiff that "I was interested in getting some control of practical selling a engineering company in consideration of this $1,000" (loan).

Loona Hagrudor testified in substance that she was employed as a waiter for three months in Practical selling a engineering Company; that she never saw plaintiff show any employee how to do work in the shop, nor did plaintiff tell her that he had an interest in the company; and that visits at plaintiff's home were social calls and no business was discussed there.

Defendant testified that the issue on the factory site, application for electric power, and application for telephone service were signed by him alone; and that he established the bank account and never had any conversation with plaintiff about the name of his company. Defendant further testified: "I agree to fulfill in the letter part of bargain, like about some money; we finally agreed that I could handle alone $50; I agree to fulfill on numerous occasions, trying to find out why the material did not get to me." Defendant also denied having any discussion with plaintiff relative to the formation of a partnership. He testified that he made application to the Commissioner of Internal Revenue for a registration number for withholding and social security taxes through Frank Butterfield, his accountant, and that Butterfield "got up my books"; that in April, 1952 plaintiff "requested 200 that his wife loaned me"; that "he also wanted to see my books"; that plaintiff had never informed him that he had spent any money of his own on small equipment, nor did he ever hold himself out as a partner in his presence or talk with him about dividing profits; and that the note which plaintiff asserts he executed in favor of Ivo. Harris for $2,000 in consideration of a loan for $1,000 was not executed by plaintiff in his presence and that the first time defendant knew of its terms was when he signed the note.

Ronald Petty, called by defendant, stated that he loaned defendant $300 around December, 1944, and that plaintiff never told the witness while he was employed at Practical Welding & Engineering Company that plaintiff was part owner of the company.

Earl Ashton, by deposition, testified that he was an employee at Practical Welding & Engineering Company for about seven months; that plaintiff "never gave me an order, nor did I see him give them to anyone; Prill had no authority in the shop that I know of."

Plaintiff and defendant testified to diametrically opposite versions of the facts as to their relationship. Relating the evidence in greater detail would unduly extend this opinion.

Since defendant in his answer denied the existence of a partnership, the burden therefore rested upon the plaintiff to show it by clear proof and satisfactory evidence.

As between the parties the question of a partnership is one of intention to be proved by express agreement or inferred from the acts or conduct of the parties. (Patek v. Patek, 263 Ill. App. 487, 492; Henry v. Darnall, 246 Ill. App. 250, 269.)

Whether a partnership has been established by an oral agreement or by the conduct of the parties is a question of fact. (Johnson v. Campanella, 314 Ill. App. 7, 11.)

It appears that defendant alone signed all the checks, made all the deposits, and withdrew all the moneys of Practical Welding & Engineering Company; that plaintiff did not know when the bank account was opened, nor the amount of money on deposit in the bank; that plaintiff was not present when the lease was executed for the factory site, nor did he know when the lease was signed; Likewise the plaintiff had no part in contracting for telephone service or electric service. He was also unfamiliar with the social security taxes and withholding taxes paid by Practical Welding & Engineering Company; nor did plaintiff appear to know whether he

Donald Foley, called by defendant, stated that he learned defendant from around December, 1941, and that plaintiff owner told the witness while he was employed at Freshical Welding & Engineering Company that plaintiff was part owner of the company.

And Lester, by deposition, testified that he was an employee of Freshical Welding & Engineering Company for about seven months; that plaintiff "never gave me an order, nor did I see him give them to anyone; Phil had no authority in the shop that I knew of."

Plaintiff and defendant testified in diametrically opposite versions of the facts as to their relationship. Rejecting the evidence in greater detail would unduly extend this opinion.

Since defendant in his answer denied his existence of a partnership, the burden therefore rested upon the plaintiff to show it by clear proof and satisfactory evidence.

As between the parties the question of a partnership is the of intention to be proved by express agreement or inferred from the acts or conduct of the parties. (Fuller v. Fuller, 290 Ill. App. 427, 432; Lacey v. Kimball, 240 Ill. App. 509, 520.)

Whether a partnership has been constituted by an oral agreement or by the conduct of the parties is a question of fact. (Johnson v. Lagomarsino, 316 Ill. App. 9, 13.)

It appears that defendant alone signed all the checks, made all the deposits, and withdrew all the money of Freshical Welding & Engineering Company; that plaintiff did not know when the bank account was opened, nor the number of money on deposit in the bank; that plaintiff had not presented when the lease was executed for the factory site, nor did he know when the lease was signed; likewise the plaintiff had no part in contracting for telephone service or electric service. He was also unqualified with the actual security taken and withdrawing funds paid by Freshical Welding & Engineering Company; nor did plaintiff appear to know whether he

had included any income from any investment in Practical Welding & Engineering Company in his income tax return.

The $200 check which plaintiff maintains he contributed to the partnership appears on the ledger sheet of Practical Welding & Engineering Company, in the handwriting of plaintiff, as a loan.

According to defendant's testimony, at the time he executed the $2,000 note to secure the loan from Mrs. Harris, it bore only defendant's signature, and that the plaintiff's signature and the word "partner" which appears on the photostatic copy were added at some later time without the knowledge or consent of defendant. The original note was not produced upon the trial. This element of the plaintiff's case presented an issue of fact the decision of which rested with the chancellor.

Although it appears undisputed that the award of a subcontract by Industrial Metal Fabricators to Practical Welding & Engineering Company was made on the sole recommendation of plaintiff, we think it is fair to assume that plaintiff based his recommendation to his employer, in this instance, free from any personal interest and upon the same considerations as those which induced him to recommend the awarding of subcontracts to many others, since Industrial Metal Fabricators' main concern was getting subcontractors of skill and ability to make bomb boxes in order to carry out its prime contract. Any other theory would involve a breach of plaintiff's duties to his employer. Under these circumstances, whether plaintiff's alleged interest in the business of Practical Welding & Engineering Company was a factor in its procuring the subcontract in question is doubtful. In any event, in our view it was a matter for the chancellor to determine. The rule has been repeatedly announced that where the chancellor hears conflicting evidence in open court his findings will not be disturbed unless manifestly and palpably against the weight of the evidence.

had included any income from any investment in Practical Welding & Engineering Company in his income tax return.

The $800 check which plaintiff maintains is consideration to the partnership appears on the ledger sheet of Practical Welding & Engineering Company, in the bookkeeping of plaintiff, as a loan.

According to defendant's testimony, at the time he executed the $2,000 note to secure the loan from Mrs. Harris, it bore only defendant's signature, and that the plaintiff's signature and the word "partner" which appears on the substantiale copy were added it some later time without the knowledge or consent of defendant. The original note was not produced upon the trial. This element of the plaintiff's case rested on issues of fact the decision of which rested with the chancellor.

Although it appears undisputed that the award of a subcontract by Industrial Metal Fabricators to Practical Welding & Engineering Company was made on the sole responsibility of plaintiff, we think it is fair to assume that plaintiff based his recommendation to his employer, in this instance, upon first-hand personal interest and upon the same considerations as those which induced him to recommend the awarding of subcontracts to many others, since Industrial Metal Fabricators, with company was giving preferential of skill and ability to make such bases in order to secure and its prime contract. Any other theory would involve a misuse of plaintiff's duties to his employer. Under these circumstances, whether plaintiff's alleged interest in the business of Practical Welding & Engineering Company was a factor in his procuring the subcontract in question is doubtful. In any event, in our view it was a matter for the chancellor to determine. The mere fact been repeatedly announced that where the chancellor hears conflicting evidence in open court his findings will not be disturbed unless manifestly and palpably against the weight of the evidence.

(Brozina v. Wanda, 387 Ill. 46, 52; Lolli v. Rondon, 389 Ill. 94, 96.)

From a careful reading of the record, we are of the opinion that the evidence amply supports the chancellor's findings in the decree.

For the reasons stated, the decree is affirmed.

DECREE AFFIRMED.

KILEY AND BURKE, JJ. CONCUR.

(Morains v. Lamb, 287 Ill. 40, 52; Ferris v. Carlson, 289 Ill. 94, 96.)

Upon a careful reading of the record, we are of the opinion that the evidence amply supports the chancellor's findings in the decree.

For the reasons stated, the decree is affirmed.

DECREE AFFIRMED.

MILLER AND BURKE, JJ., concur.

43564

MARY E. KERSTEN, Assignee of George and Anna Tomes, Appellant,	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	)	
CARL KAHLER, Appellee.	)	

A

115

330 I.A. 130

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff as an assignee of George Tomes and Anna Tomes, his wife, lessors, brought suit to recover rent alleged to be due under the terms of a written lease from defendant lessee. A judgment by confession was entered for $1,313.75 and later vacated. A jury was waived and the trial court entered judgment for defendant. Plaintiff appeals.

In her amended statement of claim plaintiff alleges that on September 30, 1938 plaintiff leased certain premises to defendant for a term of one year; that defendant remained in possession under a two-year extension clause of the lease and as holdover tenant since October 1, 1941; that on September 30, 1943 George and Anna Tomes, the lessors, assigned the lease and the rent due thereunder to plaintiff and that defendant owes plaintiff rent from April 1, 1940 for a period of 60 months, aggregating $3,600.

In his answer defendant denies that George Tomes and Anna Tomes executed the assignment of the lease and rent to plaintiff and that plaintiff is the bona fide owner thereof, and avers that he has been in possession of the premises in question since April 1, 1940 under a lease from one Peter A. Grosso; that the former owners, the Tomeses, were divested of their title to the premises in a foreclosure proceeding, and that on January 29, 1940 Grosso acquired the title to the premises and leased them to defendant on April 1, 1940. No reply was filed by plaintiff to defendant's answer.

ARY E. KENNEDY, Assignee of George and Anne Jones, Appellant, v. ELIZ. KAMLOT, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

R. PRESIDING JUSTICE LEWIS DELIVERED THE OPINION OF THE COURT.

Plaintiff as an assignee of George Jones and Anne Jones, his wife, lessors, brought suit to recover rent alleged to be due under the terms of a written lease from defendant lessee. A judgment by confession was entered for $1,312.75 and later vacated. A jury was waived and the trial court entered judgment for defendant. Plaintiff appeals.

In her amended statement of claim plaintiff alleges that on September 20, 1938 plaintiff issued certain premises to defendant for a term of one year; that defendant remained in possession under a two-year extension clause of the lease and as holover tenant since October 1, 1941; that on September 20, 1940 George and Anne Jones, the lessors, assigned the lease and the rent due thereunder to plaintiff and that defendant owes plaintiff rent from April 1, 1940 for a period of 22 months, amounting to $1,800.

In his answer defendant denies that George Jones and Anne Jones executed the assignment of the lease and rents to plaintiff and that plaintiff is the <u>bona fide</u> owner thereof, and avers that he has been in possession of the premises in question since April 1, 1940 under a lease from one Peter A. Crosso; that the former owners, the lessees, were divested of their title to the premises in a foreclosure proceeding, and that on January 29, 1940 Crosso acquired the title to the premises and leased them to defendant on April 1, 1940. No reply was filed by plaintiff to defendant's answer.

The record discloses that plaintiff's sole witness was her mother, who testified substantially as follows: George Tomes, her husband, one of the lessors, suggested the assignment of the lease to her daughter, the plaintiff. At the time this suggestion was made Tomes was ill and his "hand shaking", and in accordance with his request the witness wrote the name of George Tomes on the assignment; plaintiff is married and resides with her husband and child somewhere on the northwest side of Chicago, but the witness did not know her address, nor where she lived when the assignment was executed. On September 10, 1943, the day on which the alleged assignment was made, plaintiff came to visit her father. At the time the witness placed her name and that of her husband upon the document in question she did not observe any erasures. On cross-examination the witness admitted that in another proceeding in the Circuit Court of Cook County she had testified that she did not remember having executed the lease assignment in question, and that the plaintiff lived at the home of the witness until her husband, George Tomes, died.

Rudolph B. Salmon, an expert on questioned documents, called by defendant, testified that he had examined lessor's assignment (Pl'f's. Ex. 1), and from such examination was of the opinion that the person who wrote the name "Anna Tomes" did not write the signature "George Tomes" which appeared directly beneath that of the witness Anna Tomes. Salmon also testified that there had been writing on the alleged assignment where the name of George Tomes appeared, which had been removed by some abrasive substance.

Plaintiff's counsel, called as a witness in behalf of the defendant, testified that he did not know where his client, the plaintiff, lived, and that he talked with her at the home of Anna Tomes, her mother; he did not remember how he happened to be there on this occasion or whether he had communicated with his

The record discloses that plaintiff's sole witness was her mother, who testified substantially as follows: George Jones, her husband, was of the lessors, suggested the assignment of the lease to her daughter, the plaintiff. At the time this suggestion was made Jones was ill and bed ridden, and in accordance with his request the witness wrote his name of George Jones on the assignment; plaintiff is married and resides with her husband and child somewhere on the northwest side of Chicago, but the witness did not know her address, nor where she lived when the assignment was executed. On September 10, 1943, the day on which the alleged assignment was made, plaintiff came to visit her father. At the time the witness placed her name and that of her husband upon the document in question she did not observe any signature. On cross-examination the witness admitted that in another proceeding in the Circuit Court of Cook County she had testified that she did not remember having executed the lease assignment in question, and that the plaintiff lived at the home of the witness with her husband, George Jones, died.

Rudolph E. Nelson, on request on predictured documents, called by defendant, testified that he had examined Jones's assignment (Pl'f's. Ex. 1), and from such examination was of the opinion that the person who wrote the name "Jane Jones" did not write the signature "George Jones" which appeared directly beneath that of the witness Jane Jones. Nelson also testified that there had been writing on the alleged assignment where the name of George Jones appeared, which had been removed by some chemical substance.

Plaintiff's counsel, called as a witness in behalf of the defendant, testified that he did not know where his client, the plaintiff, lived, and that he talked with her at the home of John Jones, her father; he did not remember has he conversed to or there on this occasion or whether he had communicated with his

client and asked her to be present. When asked by defendant's counsel, "Have you talked to her since then?" he replied, "Yes", but did not remember where he had talked to her. The witness admitted that he had never shown either the amended statement of claim or the amendment to the amended statement of claim to his client; that he received the lease and the assignment (Pl'f's. Ex. 1) from either Anna Tomes or the plaintiff about the time he "entered confession judgment". That he did not remember where the lease and rent assignment had been delivered to him or by whom, if anyone, the court costs of the instant proceedings were paid.

Since all the contentions made by plaintiff hinge upon the validity of the rent assignment in the lease we shall first determine that question. On the trial defendant maintained that the instant suit was brought without the knowledge or consent of plaintiff.

It appears that plaintiff did not testify. Her mother, Anna Tomes, who was her only witness, did not seem to know where she could be found. Defendant's witness Salmon was not cross-examined nor was any testimony offered to refute his opinion that the name of George Tomes appearing on the rent assignment was a forgery. The testimony of plaintiff's counsel as to when, where and from whom he received the assignment in question for the purpose of instituting the present suit is extremely vague and uncertain. The burden of proof rested upon the plaintiff to establish her case by satisfactory evidence. We think the evidence clearly supports the conclusion that the assignment of the rent upon which plaintiff based her suit was not signed by George Tomes or by any person authorized by him and that an erasure was made where his name appears. The alleged assignment is therefore invalid.

In the view we take of the case it is not necessary to consider the other points raised.

For the reasons stated, the judgment is affirmed.

KILEY AND BURKE, JJ. CONCUR. JUDGMENT AFFIRMED.

client and asked her to be present. Then asked by defendant's counsel, "Have you talked to her since then?" he replied, "Yes", but did not remember where or how talked to her. The witness admitted that he had never shown either the wedding statement of claim or the amendment to the wedding statement of claim to his client; that he received the lease and the assignment (Pltff's. Ex. 1) from either Anna Jones or the plaintiff about the time he "obtained confession judgment". That he did not remember where the lease and rent assignment had been delivered to him or when, if ever, the court costs of the instant proceedings were paid.

Since all the contractual rights by plaintiff hinge upon the validity of the rent assignment to Jones we must first determine that question. On the trial defendant maintained that the instant suit was brought without the knowledge or consent of plaintiff.

It appears that plaintiff did not testify. Her mother, Anna Jones, who was her only witness, did not even be into court she could be found. Defendant's witness Palmer was not present examined nor was any testimony offered in rebuttal to prove that the name of George Jones appearing on the rent assignment was a forgery. The testimony of plaintiff's counsel is to show, first and from whom he received the assignment in preparing for the service of instituting the present suit is entirely vague and uncertain. The burden of proof rested upon the plaintiff to establish her case by satisfactory evidence. We think the evidence clearly supports the conclusion that the assignment of the rent upon which plaintiff based her suit was not signed by George Jones or by any person authorized by him and that on request was made where his name appears. The alleged assignment is therefore invalid.

In the view we take of the case it is not necessary to consider the other points raised.

For the reasons stated, the judgment is affirmed.

FIRST AND MAIN. 14. CONTRA. Commercial matters.

43583

REBECCA GRAVANDER, Appellee, v. CITY OF CHICAGO, a municipal corporation, Appellant.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY.

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to reverse a judgment for $2,000 entered on the verdict of a jury in an action to recover damages for personal injuries resulting from a collision between an automobile owned by plaintiff and a municipal garbage truck driven by defendant's employes. Defendant's motions for judgment notwithstanding the verdict and for a new trial were overruled.

About 10:20 o'clock on the night of September 9, 1942, George Gravander, plaintiff's son, was driving west on 115th street in the City of Chicago. At that time plaintiff was sitting in the back seat. On the north portion of 115th Street at the intersection of Indiana avenue there is a single street car track. When George Gravander reached Indiana avenue he reduced his speed from 20 miles an hour to 5 miles an hour and was straddling the street car rails on the north side of the street. While crossing Indiana avenue he observed the headlights of a garbage truck directly in front of him also straddling the street car rails on the north side of 115th street. As he attempted to swerve to the north plaintiff's automobile collided with the garbage truck in question, causing the injuries complained of.

42563

REBECCA GRAVINDER, Appellee, v. CITY OF CHICAGO, a municipal corporation, Appellant.	APPEAL FROM CIRCUIT COURT COOK COUNTY.

Mr. PRESIDING JUSTICE KERR DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to reverse a judgment for $2,000 entered on the verdict of a jury in an action to recover damages for personal injuries resulting from a collision between an automobile owned by plaintiff and a municipal garbage truck driven by defendant's employee. Defendant's motions for judgment notwithstanding the verdict and for a new trial were overruled.

About 10:30 o'clock on the night of December 6, 1946, George Gravender, plaintiff's son, was driving west on 111th street in the city of Chicago. At that time plaintiff was sitting in the back seat. On the north portion of 111th street at the intersection of Indiana avenue there is a single street car track. When George Gravender reached Indiana avenue he reduced his speed from 20 miles an hour to 5 miles an hour and was straddling the street car rails on the south side of the street. While crossing Indiana avenue he observed the headlights of a garbage truck directly in front of his also straddling the street car rails on the north side of 111th street. He he attempted to swerve to the north plaintiff's automobile collided with the garbage truck in question, causing the injuries complained of.

The sole question presented is whether defendant was exercising a governmental function in the collection and disposition of garbage. The precise question involved here has been passed upon in this court in Wasilevitsky v. City of Chicago, 280 Ill. App. 531, and Schmidt v. City of Chicago, 284 Ill. App. 570. In his argument defendant says that the foregoing decisions "are not in harmony with the weight of sound authority."

The line of demarcation between municipal operations that are proprietary and therefore the proper subject of suits in tort, and those that are governmental and therefore immune from such acts, is not clearly defined. (38 Am. Jur. sec. 574, p. 267.) Moreover it is impossible to reconcile the cases in the courts of our country on this question. In Wasilevitsky v. City of Chicago, at page 541 this court said: "There are authorities holding to the contrary on the theory that cleaning streets and the removal of garbage are health measures and are therefore governmental. But, so far as we are advised, the collection and removal of garbage even as a health measure has never been adopted as a function of the general government. If a State does not owe the duty to the public to remove garbage, it is not clear how a municipality can be its agent exercising the delegated powers of the State in its performance. In the cases just cited it is held that the removal of garbage is directly for the benefit of the city's residents in which the State, if at all, has only an indirect interest - - a secondary consideration. We think this latter view is in accordance with common sense and sound reasoning and

The sole question presented is whether defendant was exercising a governmental function in the collection and disposition of garbage. The precise question involved here has been passed upon in this court in Scaffidavitsky v. City of Chicago, 250 Ill. App. 521, and Tomaiet v. City of Chicago, 254 Ill. App. 270. In his argument defendant says that the foregoing decisions are not in harmony with the weight of recent authority."

The line of demarcation between municipal operations that are proprietary and therefore the proper subject of suits in tort, and those that are governmental and therefore immune from such suits, is not clearly defined. (38 Am. Jur. sec. 271, p. 287.) Moreover, it is impossible to reconcile the cases in the courts of our country on this question. In Davidson v. City of Chicago, it was said that this court said: "There are authorities holding to the contrary on the theory that cleaning streets and the removal of garbage are lawful measures and are therefore governmental. But, so far as we are advised, the collection and removal of garbage even as a health measure has never been adopted as a function of the general government. If a city does not owe the duty to the public to remove garbage, it is not clear how a municipality can be its agent executing the delegated power of the state in its performance. In the case just cited it is held that the removal of garbage is directly for the benefit of the city's residents in which the state, if at all, has only an indirect interest - a secondary consideration. In this the latter view is in accordance with common sense and sound reasoning and

in line with the authorities of our own State, some of which are Johnston v. City of Chicago, 258 Ill. 494; Bedtke v. City of Chicago, 240 Ill. App. 493 - - certiorari denied by the Supreme Court, 241 Ill. App. XV - - and Roumbos v. City of Chicago, 332 Ill. 70."

We shall adhere to the law as announced in the Wasilevitsky and Schmidt cases.

For the reasons stated, the judgment is affirmed.

JUDGMENT AFFIRMED.

KILEY AND BURKE, JJ. CONCUR.

In line with the authorities of our own State, some of which are *Johnston* v. *City of Dubuque*, 260 III. 164; *Taylor* v. *City of Chicago*, 240 III. 4o, 4o3 - - particularly denied by the Supreme Court, 241 III. 4o, 6[illegible] - - and *Dunphy* v. *City of Chicago*, 2[illegible] III. 7o."

We shall adhere to the law as announced in the *Hartfelder* and *Schmidt* cases.

For the reasons stated, the judgment is affirmed.

JUDGMENT AFFIRMED.

STONE and BURKE, JJ., concur.

43615

IRVING L. COHEN, Appellant, v. WALTER J. CUMMINGS, as receiver of Chicago Railways Co., a corporation, and EDWARD J. FLEMING and CHARLES H. ALBERS, as Receivers of Chicago Railway Co., Calumet & South Chicago Railway Co. and the Southern Street Railways Co., corporations doing business as CHICAGO SURFACE LINES, Appellees.	APPEAL FROM CIRCUIT COURT COOK COUNTY.

35

330 I.A. 431

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action in which the court at the close of plaintiff's case directed a verdict for defendant. The reason given for the ruling was that the accident came under the Workmen's Compensation Act and that plaintiff's common law action was, therefore, barred. Plaintiff has appealed.

Plaintiff alleged both negligence and wilful and wanton conduct. He charged that on July 7, 1943, while the truck he was driving stood facing south on Broadway near Argyle in Chicago, defendant drove its street car into the rear of the truck, causing plaintiff's injury. Defendants made issue of the several acts of negligence and misconduct. They averred that plaintiff suddenly turned into the path of the street car and stopped, so that there was no opportunity to stop the street car and avoid the collision. Defendants' answer was later amended to aver that the defendants and the B. A. Klein Noodle Co., plaintiff's employer, were under the Workmen's Compensation Act; and that the accident arose out of and in the course of plaintiff's employment and was, accordingly, barred. Plaintiff replied denying that he was an employee of the Klein Co. or engaged in its business at the time and denying that the accident arose out of or in the course of any employment of his with the company.

At the time of the accident plaintiff had worked for the Klein Co. for 9 months as a driver-salesman. His hours were from 7 A. M. to 5:30 P. M. He drove a truck and distributed merchandise from the Company to customers. The Company's trucks were kept in garages selected by the drivers, and approved and paid for by the Company. The Company "wanted" the trucks in the garage every night and the driver's were told to quit at 5:30 P. M. and the Company "assumed that they would". The drivers were instructed to quit deliveries at 5:30 P. M. and, if necessary, to complete the unfinished day's route on the next day. They were instructed to put the trucks into the garages immediately upon quitting and were not permitted to take the trucks home.

On the evening in question plaintiff finished with his last customer about 5:20 P. M. This stop was about a mile south of the garage on Broadway in which plaintiff housed the truck he drove. He had decided to drive home for an early dinner to coincide with his wife's plans. He lived one block east and three blocks north of the garage. He drove north past the garage on his way to dinner, arriving home about 5:35 P. M. He had only once before in 9 months driven home before putting the truck away.

After dinner he drove west to Broadway and south on Broadway in the southbound tracks until he reached a point opposite the garage which was on the east side of the street. He had not noticed a southbound street car behind the truck. He stopped opposite the garage to let northbound traffic pass. He put out his left hand to signal the traffic to the rear. He looked into the rear vision mirror while waiting to make the turn. The front wheels of his truck were straddling the east southbound rail.

At the time of the accident plaintiff had worked for the Klein Co. for 2 months as a driver-salesman. His hours were from 7 A. M. to 5:30 P. M. He drove a green and distinctive marked truck from the Company to customers. The Company's trucks were kept in garages rented by the drivers, and approved and paid for by the Company. The Company "wanted" the trucks in the garage every night and the driver's were told to quit at 5:30 P. M. and the Company "assured" that they would". The drivers were instructed to quit definitely at 5:30 P. M. and, if necessary, to complete the unfinished day's route on the morrow. They were instructed to put the trucks into the garages immediately upon quitting and were not permitted to take the trucks home.

On the evening in question plaintiff finished with his last customer about 5:50 P. M. This stop was about a mile south of the garage on Broadway in which plaintiff housed the truck he drove. He had decided to drive home for an early dinner to celebrate with his wife's plans. He lived one block west and three blocks north of the garage. At Bronx Park West the garage on his way to dinner, arriving home about 6:00 P. M. He had only once before in 9 months drives home before putting the truck away.

After dinner he drove west on Broadway and south on Broadway in the southbound lanes until he reached a point opposite the garage which was on the east side of the street. He had not noticed a southbound street car behind the truck. He stopped opposite the garage to let northbound traffic pass. He not had his left hand to signal the traffic to the rear. He turned into the rear vision mirror while waiting to make the turn. The front wheels of his truck were straddling the east southbound rail.

After a 5 or 6 second wait and as he was "about ready" to turn left to the garage, the street car struck the rear of the truck. The truck was propelled forward into a northbound truck. Plaintiff was injured. The accident occurred about 6:30 P. M.

T he trial court stated in ruling that when plaintiff started to drive the truck to the garage as was his duty, according to instructions from his employer, he was acting within the scope of his employment. Plaintiff contends that the Workmen's Compensation Act does not apply because when the accident occurred he was in violation of his employer's orders in not having gone directly to the garage at 5:30 P. M. and because he violated the instructions for his own purposes and conveniences.

The effect of the court's ruling was to sustain the defendant's affirmative defense that the accident arose out of and in the course of plaintiff's employment. Defendants had the burden of proving the affirmative defense. They introduced no evidence. It was not necessary for them to do so if the evidence to discharge that burden was produced by plaintiff. They chose to rely upon the evidence in plaintiff's case. To test the correctness of the court's ruling we shall take plaintiff's evidence as true and draw all reasonable inferences most strongly in his favor. If, with these advantages to plaintiff, we believe that all reasonable men would come to the same conclusion as the trial judge, its ruling was correct.

We have read a great many cases cited by both parties. Generally, these cases involved appeals from decisions which had affirmed, or set aside, awards by the Industrial Commission under the Act. It must be remembered that, in the instant case, we are considering plaintiff's common law action. In the cases cited by the parties the plaintiff's burden was to prove the injury suffered arose out of and in the course of the employment.

After a 5 or 6 second wait and as he was about ready to turn left to the garage, the street car struck the rear of the truck. The truck was propelled forward into a northbound truck. Plaintiff was injured. The accident occurred about 6:30 P. M.

The trial court stated in ruling that when Plaintiff started to drive the truck to the garage at the end of his duty, according to instructions from his employer, he was acting within the scope of his employment. Plaintiff contends that the Workmen's Compensation Act does not apply because when the accident occurred he was in violation of his employer's orders in not having gone directly to the garage at 3:30 P. M. and therefore he violated the instructions for his own purposes and convenience.

The effect of the court's ruling was to sustain the defendant's affirmative defense that the accident arose out of and in the course of plaintiff's employment. Defendants had the burden of proving the affirmative defense. They introduced no evidence. It was not necessary for them to do so if the evidence to discharge that burden was produced by plaintiff. They chose to rely upon the evidence in plaintiff's case. In test the correctness of the court's ruling we shall take plaintiff's evidence as true and draw all reasonable inferences most strongly in his favor. If, with these advantages to plaintiff, we believe that all reasonable men would come to the same conclusion as the trial judge, its ruling was correct.

We have read a great many cases cited by both parties. Generally, these cases involved appeals from decisions which had affirmed or set aside awards by the Industrial Commission under the Act. It must be remembered that, in the instant case, we are considering plaintiff's common law action. In the cases cited by the parties the plaintiff's burden was to prove the injury suffered arose out of and in the course of the employment.

In the instant case that was defendant's burden.

There is no question that plaintiff, his employer and defendant, all come under the Act. The question is whether, according to the rule announced for testing the trial court's ruling, it appears from the testimony that plaintiff's injury arose out of and in the course of his employment.

Plaintiff's duties included housing the truck after his day's work. Since he was injured while engaged in the performance of this duty, we think no reasonable person would doubt that his injury arose out of his employment. Irwin Neisler & Co. v. Industrial Commission, 346 Ill. 89. This conclusion narrows our inquiry to the further question whether plaintiff's injury arose in the course of his employment. This has to do with the time, place and circumstances. Irwin Neisler & Co. v. Industrial Commission. It, as well as the foregoing question, is ordinarily one of fact. Porter Co. v. Industrial Commission, 301 Ill. 76. The trial court decided it as one of law.

Some cases have been cited by each party wherein the person seeking an award for the injury violated, as plaintiff did here, instructions of his employer. The rule is that where a plaintiff has violated the instruction of his employer and the violation takes him out of the sphere of his employment and the injury occurs during the violation, the accident arises out of the course of employment. Republic Iron and Steel Co. v. Industrial Commission, 302 Ill. 401. On the other hand, if the violation does not take him out of the sphere of his employment, he is guilty of negligence but his recovery under the Compensation Act is not barred. Republic Iron and Steel Co. v. Industrial Commission. These rules are repeated in Heyman Distributing Co. v. Industrial Commission, 376 Ill. 90, where the court points out that there is no dispute about the rule, but frequent difficulty in applying it

In the instant case that the defendants' motion.

There is no question that plaintiff, his employer and defendant, all were under the act. The question is whether, according to the rule announced for ascertaining the defendant's liability, it appears from the testimony that plaintiff's injury arose out of and in the course of his employment.

Plaintiff's duties included driving the truck during the day's work. Prior to the injury he had gone to the warehouse in the outskirts of the city, as taking no passengers inside could cause the injury arose out of his employment. Arnold Dairies v. Industrial Commission, 240 Ill. 88. This conclusion disposes the inquiry as to the further question whether plaintiff's injury arose in the course of his employment. This has to do with the time, place and circumstances. Arnold Dairies v. Industrial Commission. It, as well as the foregoing question, is ordinarily one of fact. Carter Co. v. Industrial Commission, 302 Ill. 76. The trial court decided it in the nature of law.

Some cases have been cited by each party showing the person making an award for the injury violated, in plaintiff's case, instructions of his employer. The rule is that where a plaintiff has violated the instructions of his employer the violation takes his out of the course of his employment and the injury occurs during the violation, the accident arises not of the course of employment. Chicago Line Cor Fact Co. v. Industrial Commission, 302 Ill. 403. On the other hand, if the violation does not take him out of the course of his employment, he is guilty of negligence but his instant injury was the proximate cause of his death. Chicago Line Cor Fact Co. v. Industrial Commission. These rules are repeated in Arnold Dairies v. Industrial Commission, 276 Ill. 87, where the court holds that there is no dispute about the rule, but frequent difficulty in applying it

to different factual situations. The Supreme Court there reviewed several decisions in some of which the rule was applied to bar the award and in some to grant it.

We believe the court correctly decided that driving the truck to the garage, although an hour late, was within the sphere of plaintiff's employment. The injury did not occur while he was violating his employer's instructions for his own convenience. We are not called upon to say how the principle would apply in a situation suggested by plaintiff should a truck driver remain all night with the truck. Plaintiff's theory is that he would not have been at the place and at the time he was when injured had he followed his employers' instructions and that by failing to follow them he assumed a risk which was not incidental to the faithful performance of his duty. This theory finds support in a rule stated in Dietzen Company v. Industrial Commission, 279 Ill. 11, which included the language "that an employee is engaged in the course of his employment when the injury occurs within the period of his employment * * *." In that case the employee was injured while violating the instructions. Plaintiff's theory also finds support in the language in Irwin Neisler & Co. v. Industrial Commission. In that case, however, the employee was on his way home after hours, when injured, and was granted an award as having been injured when on a company errand.

We think it is unnecessary to discuss the case further. The decisive issue is whether plaintiff was, at the time of the accident, violating a rule while still in the scope of his employment, or whether the transgression took him outside its sphere. Heyman Distributing Co. v. Industrial Commission. We decide, as a matter of law, that plaintiff was injured while still in the scope of his employment and, accordingly, the ruling of the trial court is hereby sustained.

The judgment of the Circuit Court is, therefore, affirmed.

JUDGMENT AFFIRMED.

LEWE, P.J. AND BURKE, J. CONCUR.

to different factual situations. The Supreme Court recently rendered several decisions in some of which the rule was applied to her the award and in some to grant it.

In Galvez the court correctly decided that driving the truck in the course, although or most late, and violating the orders of plaintiff's employer. The injury did not occur while he was violating his employer's instructions for his own convenience. We are not called upon to say that the conduct would apply in a situation supported by [illegible] - [illegible] [illegible] [illegible] all right with the court. [illegible]'s theory is that he would not have been in the [illegible] of the time he was when injured but he followed his employer's instructions and that by failing to follow them he engaged in [illegible] not incidental to the faithful performance of his duty. This theory finds support in a rule stated in Larson Workmen's Comp. Law, [illegible] 27, which included the language "that an employee is engaged in the course of his employment when the injury occurs within the period of his employment [illegible]." In that case the employee was injured while violating the instructions. Plaintiff's theory also finds support in the language in Lopez v. Ge. [illegible] Industrial Commission. On that case, however, the employee was on duty [illegible] office hours, when injured, and was engaged in work as [illegible] been injured when on a passage around.

We think it is unnecessary to discuss the rule further. The decisive issue in whether plaintiff was, at the time of his accident, violating a rule which will in the minds of the reasonable, so whether the transportation that his [illegible] in [illegible] Liquid Distributing Co. v. Industrial Commission. We decide, in a matter of law, that plaintiff was injured while still in the course of his employment and, accordingly, the ruling of the trial court is hereby reversed.

The judgment of the Circuit Court is, therefore, affirmed.

Judgment affirmed.

[illegible] J. [illegible] [illegible]

43615

IRVING L. COHEN, Appellant, v. WALTER J. CUMMINGS, as Receiver of Chicago Railways Company, a corporation, and EDWARD J. FLEMING and CHARLES H. ALBERS, as Receivers of Chicago City Railways Company, Calumet & South Chicago Railway Company and the Southern Street Railways Company, corporation, d/b/a CHICAGO SURFACE LINES, Appellees.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY.

ON REHEARING.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

We have considered the petition for rehearing and the answer thereto in the above entitled cause. It is our view that the recent case of Public Service Company of Illinois v. Industrial Commission, et al., 395 Ill. 238 is clearly distinguishable, on the facts, from the instant case. We, therefore, adhere to our opinion which was filed in this court on November 20, 1946, wherein the judgment was affirmed.

JUDGMENT AFFIRMED.

LEWE, P.J. AND BURKE, J. CONCUR.

IRVING I. COHEN, Appellant, v. WALTER J. CUNNING, as Receiver of Chicago Railway Company, a corporation, and EDWARD J. KILKING and CHARLES S. ALLEN, as Receivers of Chicago City Railway Company, Calumet & South Chicago Railway Company and the Southern Street Railway Company, corporation, d/b/a CHICAGO SURFACE LINES, Appellees.	APPEAL FROM MUNICIPAL COURT. COOK COUNTY.

Mr. PRESIDING JUSTICE KILEY delivered the opinion of the court.

We have considered the petition for rehearing and the answer thereto in the above entitled cause. It is our view that the recent case of Public Service Commission of Illinois v. Industrial Commission, et al., 395 Ill. 298 is clearly distinguishable, on the facts, from the instant case. We, therefore, adhere to our opinion which was filed in this court on November 20, 1944, wherein the judgment was affirmed.

JUDGMENT AFFIRMED.

LEWE, P.J. AND BURKE, J. CONCUR.

43674

330 I.A. 432

ELI METCOFF,

Plaintiff - Appellant,

v.

NEWTON C. FARR, GEORGE G. BOGERT, HAROLD G. TOWNSEND, DAVID L. SHILLINGLAW and WARREN CANADAY, Trust Managers of the Flamingo Hotel Liquidation Trust and CHICAGO CITY BANK AND TRUST COMPANY, as Trustee under Trust No. 2150,

Defendants - Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a chancery action to invalidate the extension of the Flamingo Hotel Liquidation Trust Agreement and to recover for the trust profits made by Trust Managers through purchase of units of beneficial interest and to determine the Trust, or as alternative to all the foregoing, remove the Trust Managers. The court sustained a motion to dismiss the amended complaint and entered a decree accordingly. The plaintiff has appealed.

Defendants' motion admitted well-pleaded allegations in the amended complaint but not conclusions of the pleader. We shall consider the material allegations to determine whether a cause of action is stated. The Flamingo Hotel property was conveyed in trust under the agreement pursuant to the approval of the Federal District Court having jurisdiction of the re-organization proceedings. Bondholders of the hotel became beneficiaries under the agreement. Plaintiff is owner of 11,653 units of beneficial interest. There were 1,270,807 units outstanding.

The object of the Trust Agreement was liquidation of the hotel property as soon as practicable in the opinion of the Trust Managers. Proceeds were to be distributed to the beneficiaries.

45574

ELI MOTCOFF,

Plaintiff - Appellant,

v.

NEWTON G. FAIR, GEORGE S. LOMBARD, HAROLD G. MCCONNELL, DAVID L. [illegible], [illegible] and [illegible] [illegible], Trust Managers of the Flamingo Hotel Liquidation Trust and CENTRAL CITY BANK AND TRUST COMPANY, as Trustee under Trust No. 2190,

Defendants - Appellees.

APPEAL FROM

MIDDLEBORO COUNTY

COOK COUNTY.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a chancery action to invalidate the extension of the Flamingo Hotel liquidation Trust Agreement and to recover for the trust profits made by Trust Managers through purchase of units of beneficial interest and to determine the Trust, or as alternative to all the foregoing, remove the Trust Managers. The court sustained a motion to dismiss the amended complaint and entered a decree accordingly. The plaintiff has appealed.

Defendants' motion admitted well-pleaded allegations in the amended complaint but not conclusions of the pleader. It shall consider the material allegations to determine whether a cause of action is stated. The Flamingo Hotel property was conveyed in trust under the agreement pursuant to the approval of the Federal District Court having jurisdiction of the re-organization proceedings. Bondholders of the hotel became beneficiaries under the agreement. Plaintiff is owner of 11,685 units of beneficial interest. There are 1,070,807 units outstanding.

The object of the Trust Agreement was liquidation of the hotel property as soon as practicable in the opinion of the Trust Managers. Proceeds were to be distributed to the beneficiaries.

Trust Managers were to control the management of the property until the sale and distribution. If the holders of two-thirds of the units so directed, the property was to be sold before the term of the agreement but, in the event no purchaser was procured by the Trust Managers, 10 years after the date of the agreement, a public sale was to be had. The Trust Managers were empowered, however, if they deemed it advisable, to extend the term for five years. Prerequisites for the extension were a notice to the Trustee 40 days in advance of the extension date, notice by it to the beneficiaries and a period of 20 days from the mailing of the notice to them, in which beneficiaries might object to the extension. Holders of 33 per cent or more of units outstanding could, by filing written objections, prevent an extension.

May 22, 1945 the Trust Managers gave notice of their intention and resolution to extend the term. Beneficiaries were advised of the 20 day period within which to object. May 26, plaintiff wrote the Trust Managers asking them to prepare for him a list of the beneficiaries so that he could communicate with them to oppose the extension. May 29, defendants' attorneys responded refusing to make up a list, but inviting plaintiff to examine the list in the office of the Trustee. June 2, plaintiff went to the office and was advised there was no list, but that he could inspect the stubs in the certificate books. June 4, he began to copy the names. This took him 2 days. June 6, he wrote 900 beneficiaries urging their dissent. Holders of less than the necessary 33 per cent dissented within 20 days. The Trust Managers on July 5, 1945 gave notice of the extension.

The Managing Agent of the Hotel property purchased 58,862 units in his own name. A Trust Manager, Newton C. Farr, purchased 68,979 units in the name of an associate, Ronald J.

Trust Managers were to control the management of the property until the sale and distribution. If the holders of two-thirds of the units so directed, the property was to be sold before the term of the agreement but, in the event of overcoming the property by the Trust Managers, 10 years after the date of the agreement, a public sale was to be had. The Trust Managers were empowered, however, if they deemed it advisable, to extend the term five years. Prerequisites for the extension were a notice to the Trustee 60 days in advance of the extension date, notice by it to the beneficiaries and a period of 30 days from the mailing of the notice to them, in which beneficiaries might object to the extension. Holders of 75 per cent or more of units outstanding could, by filing written objections, prevent an extension.

May 22, 1945 the Trust Managers gave notice of their intention and resolution to extend the term. Beneficiaries were advised of the 30 day period within which to object. May 26, plaintiff wrote the Trust Managers asking them to prepare for him a list of the beneficiaries so that he could communicate with them to oppose the extension. May 29, defendants' attorneys responded refusing to make up a list, but inviting plaintiff to examine the list in the office of the Trustee. June 2, plaintiff went to the office and was advised there was no list, but that he could inspect the stubs in the certificate books. June 4, he began to copy the names. This took him 2 days. June 8, he wrote 900 beneficiaries urging their dissent. Returns of less than the necessary 75 per cent dissented within 30 days. The Trust Managers on July 2, 1945 gave notice of the extension.

The managing agent of the Bond property processed 22,222 units in his own name. A Trust Manager, Fenton G. Tarr, purchased 22,272 units in the name of a nominee, Harold J.

Trust Managers were to control the management of the property until the sale and distribution. If the holders of two-thirds of the units so directed, the property was to be sold before the term of the agreement but, in the event no purchaser was procured by the Trust Managers, 10 years after the date of the agreement, a public sale was to be had. The Trust Managers were empowered, however, if they deemed it advisable, to extend the term for five years. Prerequisites for the extension were a notice to the beneficiaries 40 days in advance of the extension date and a period of 20 days from the mailing of the notice in which beneficiaries might object to the extension. Holders of 33 per cent or more of units outstanding could, by filing written objections, prevent an extension.

May 22, 1945 the Trust Managers gave notice of their intention and resolution to extend the term. Beneficiaries were advised of the 20 day period within which to object. May 26, plaintiff wrote the Trust Managers asking them to prepare for him a list of the beneficiaries so that he could communicate with them to oppose the extension. May 29, defendants' attorneys responded refusing to make up a list, but inviting plaintiff to examine the list in the office of the Trustee. June 2, plaintiff went to the office and was advised there was no list, but was permitted to inspect the stubs in the certificate books. June 4, he began to copy the names. This took him 2 days. June 6, he wrote 900 beneficiaries urging their dissent. Holders of less than the necessary 33 per cent dissented within 20 days. The Trust Managers on July 5, 1945 gave notice of the extension.

The Managing Agent of the Hotel property purchased 58,862 units in his own name. A Trust Manager, Newton C. Farr, purchased 68,979 units in the name of an associate, Ronald J.

Trust Managers were to control the management of the property until the sale and distribution. If the holders of two-thirds of the units so directed, the property was to be sold before the term of the agreement but, in the event no purchasers were procured by the Trust Managers, 10 years after the date of the agreement, a public sale was to be had. The Trust Managers were empowered, however, if they deemed it advisable, to extend the term for five years. Prerequisites for the extension were a notice to the beneficiaries 40 days in advance of the extension date and a period of 30 days from the mailing of the notice in which beneficiaries might object to the extension. Holders of 33 per cent or more of units outstanding could, by filing written objections, prevent an extension.

May 23, 1944 the Trust Managers gave notice of their intention and resolution to extend the term. Beneficiaries were advised of the 30 day period within which to object. May 29, plaintiff wrote the Trust Managers asking them to provide for him a list of the beneficiaries so that he could communicate with them to oppose the extension. May 29, defendants' attorney responded refusing to make up a list, but inviting plaintiff to examine the list in the office of the Trustee. June 2, plaintiff went to the office and was advised there was no list, but was permitted to inspect the stubs in the certificate book. June 4, he began to copy the names. This took him 8 days. June 7, he wrote 900 beneficiaries urging their dissent. Holders of less than the necessary 33 per cent dissented within 30 days. The Trust Managers on July 8, 1943 gave notice of the extension.

The Managing Agent of the Hotel property purchased 38,880 units in his own name. A Trust Manager, Lawson E. Thatcher, purchased 68,979 units in the name of an associate, Donald G.

Chinook. Plaintiff charges that the purchase of these units was not disclosed to the beneficiaries; that the purchasers failed to disclose to the sellers "material information as to the value of the units"; that the purchasers eliminated dissents; and that the units were purchased at a depressed value brought about by failure of the Trust Managers to declare dividends and were held in bad faith. Under the agreement the Trust Managers were authorized to own, hold and deal in the certificates "fully and freely" as individuals. The limitations are that certificates be taken in good faith, with full disclosure of the purchaser's position, etc., to the seller of the units.

There are no facts alleged from which to attribute to the Trust Managers responsibility for the action of the agent. There are no facts alleged to support the charges of elimination of dissents, bad faith in purchasing, and deliberate depression in value. It is not alleged who the sellers were or what the value was which Farr failed to disclose to those sellers, or at what price Farr purchased. Furthermore, the total of the units charged to the agent and Farr, added to those received by the trustee, still falls below the requisite 33 per cent.

Plaintiff charges that defendants frustrated his attempt to gather dissents by delaying him through withholding the true, and allowing him to inspect a false list of the beneficiaries. In the first place there was no requirement that the Trust Managers make up a list for plaintiff or keep a list of beneficiaries. The agreement required the keeping of an accurate record of beneficiaries with names and addresses available for inspection by beneficiaries at reasonable intervals during business hours. The stubs in the certificate book were a record. There is no showing in the

Chinook. Plaintiff charges that the purchase of these units was not disclosed to the beneficiaries; that the purchasers failed to disclose to the sellers "material information as to the value of the units"; that the purchasers eliminated diseases; and that the units were purchased at a depressed value brought about by failure of the Trust Managers to declare dividends and were held in bad faith. Under the agreement the Trust Managers were authorized to own, hold and deal in the certificates "fully and freely" as individuals. The limitations are that certificates be taken in good faith, with full disclosure of the purchaser's position, etc., to the seller of the units.

There are no facts alleged from which to attribute to the Trust Managers responsibility for the action of the agent. There are no facts alleged to support the charges of elimination of diseases, bad faith in purchasing, and deliberate depression in value. It is not alleged who the sellers were or what the value was which Farr failed to disclose to these sellers, or at what price Farr purchased. Furthermore, the total of the units charged to the agent and Farr, added to those received by the trustee, still falls below the requisite 33 per cent.

Plaintiff charges that defendants frustrated his attempt to gather diseases by delaying him through withholding the trust, and allowing him to inspect a false list of the beneficiaries. In the first place there was no requirement that the Trust Managers make up a list for plaintiff or keep a list of beneficiaries. The agreement required the keeping of an accurate record of beneficiaries with names and addresses available for inspection by beneficiaries at reasonable intervals during business hours. The stubs in the certificate book were a record. There is no showing in the

pleading wherein and to what extent the record was false, to plaintiff's prejudice. It is alleged that 101 letters were returned by the Post Office undelivered. It is not charged they were undelivered because of false records. The allegations do not show special haste on the part of plaintiff in obtaining access to the record nor undue delay on the part of defendants or their attorneys in the treatment of plaintiff's request. It is alleged there was no ballot given beneficiaries to facilitate their opportunity to dissent. There is no requirement for a ballot in the agreement.

It is alleged that the Trust Managers made no attempt to sell the property during the original term. There is no allegation of facts from which the trial court or we can determine whether the failure to attempt to sell was a breach of trust or was imprudent. The various provisions as to selling were limited by the provision that the sale should be held as soon as the Trust Managers considered it practical. There are no facts alleged from which we could say that it was a breach of trust not to sell during the original term.

We have considered the cases cited by both parties. We need to refer to no authority, nor distinguish cases cited, in order to hold that the amended complaint does not state a cause of action on which the relief prayed can be granted.

DECREE AFFIRMED.

LEWE, P.J. AND BURKE, J. CONCUR.

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We have considered the cases cited by both parties. We need to refer to no authority, nor distinguish cases cited, in order to hold that the amended complaint does not state a cause of action on which the relief prayed can be granted.

ORDER AFFIRMED.

LEWIS, P.J. AND ERNEX, J. CONCUR.

43775

330 I.A. 433

JOHANNA ROWLEY, Appellee,	)	APPEAL FROM
v.	)	SUPERIOR COURT
THOMAS J. FRIEL and CHARLES C. RENSHAW, as Trustees, etc. et al., doing business as CHICAGO SURFACE LINES, Appellants.	)	COOK COUNTY.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action based on plaintiff's fall from a street car. Verdict and judgment were for plaintiff in the amount of $15,000. Defendant appeals.

The accident happened June 3, 1944 between 2:00 and 3:00 P.M. at 71st Street and Stony Island Avenue, Chicago, Ill. Seventy-first Street, an east and west street, is 93 feet wide and in its center carries two tracks of the Illinois Central Railroad. North of the tracks the right of way is 24 feet 8 inches wide and the sidewalk is 9 feet 10 inches wide. Stony Island Avenue, a north and south street measures 107 feet 6 inches from curb to curb. In its center is a 70 foot 6 inch parkway. Defendants north and southbound tracks are laid in the center of the parkway, the southbound being to the west. The east and west roadways of Stony Island Avenue measure 50 feet. At this unusual intersection are 8 stop and go traffic lights; one at each corner of the parkway, and, one at each corner of the roadways, and 71st Street. On the parkway north of 71st Street and east of defendant's tracks is a shack for a watchman employed by defendant to signal its cars across the Illinois Central tracks. Also in this north parkway north of the sidewalk and west of the southbound track is a gravel walk or zone for persons intending to board southbound street cars.

43775

JOHANNA NOLLEY,	APPEAL FROM
Appellee,	
v.	MUNICIPAL COURT
THOMAS J. FRILL and CHARLES G. MERRIAM, as Trustees, etc. et al., doing business as CHICAGO RAPIDS LINES,	COOK COUNTY.
Appellants.	

Mr. JUSTICE MILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action based on plaintiff's fall from a street car. Verdict and judgment were for plaintiff in the amount of $15,000. Defendant appeals.

The accident happened June 4, 1944 between 5:00 and 6:00 P.M. at Flat Street and Stony Island Avenue, Chicago, Ill. Seventy-first Street, an east and west street, is 99 feet wide and in its center carries two tracks of the Illinois Central Railroad. North of the tracks the right of way is 24 feet 8 inches wide and the sidewalk is 9 feet 10 inches wide. Stony Island Avenue, a north and south street measures 107 feet 2 inches from curb to curb. In its center is a 20 feet 2 inch parkway. Defendants north and southbound tracks are laid in the center of the parkway, the southbound being to the west. The east and west roadways of Stony Island Avenue measure 80 feet. At this unusual intersection are 8 stop and go traffic lights; one at each corner of the parkway and, one at each corner of the roadways and Flat Street. On the parkway north of Flat Street and east of defendant's tracks is a shack for a watchman employed by defendant to signal its cars across the Illinois Central tracks. Also in this north parkway north of the sidewalk and east of the southbound track is a gravel walk or zone for persons intending to board southbound street cars.

On June 3, 1944, plaintiff got off a westbound 71st Street bus at the northeast corner of the intersection. She had obtained a transfer to go south on a Stony Island street car. She crossed the east roadway of Stony Island Avenue and proceeded to the west side of the parkway and boarded the car. She was carrying in one hand a cardboard suit box and under her arm on the same side, her purse. She fell from the step of the street car and was injured. This suit followed.

Defendants contend that the verdict is against the manifest weight of the evidence; that the verdict is excessive; and that the court committed error in instructing the jury.

Plaintiff and her witness Ferguson said she boarded the car step while the car stood still, and that she fell when the car started, while she was attempting to step up to the platform. The conductor and a woman passenger said that she tried to board the car while it was in motion after it had moved about 30 feet. The motorman and watchman inferentially corroborated the latter testimony by saying that plaintiff hurried in front of the car after the light changed to green and the car began to move. Defendants point to the distance walked by plaintiff while the red light was against the car; her failure to keep track of the time in relation to the traffic lights; and her box and purse. They say had she acted prudently considering these factors and listened for the starting bell, she would not have attempted to board the car. We see no merit in these contentions. If the jury believed that the car had not yet started when plaintiff boarded the step, they could consider the factors referred to immaterial.

The substance of plaintiff's testimony is that she crossed in front of the car while it was stopped; walked north along the gravel path; held the box and purse in her left hand

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The substance of plaintiff's testimony is that she crossed in front of the car while it was stopped; walked north along the gravel path; held the box and purse in her left hand

and arm and grasped the hand iron with her right hand and boarded the car step; that when both feet were on the step she sought to place one foot on the platform; and that while she was thus disposed the car started with a jerk, throwing her off balance, resulting in her injury. There are discrepancies in the testimony as to whether the car jerked; which hand she used to grasp the hand iron; whether her feet dragged before she fell; whether the street car bell had been rung; and the position in which she fell. We think these were for the jury to resolve. We cannot say the jury should have found other than they did on this point.

Substantially the same evidence bearing upon the question of plaintiff's due care bears upon the question of defendants' negligence. The jury had two theories before it. Plaintiff's was based on her testimony and that of Ferguson that the car was standing still as plaintiff, holding the grab iron stepped on to the step of the car with both feet and, while she was reaching her foot for the platform, the car started, according to plaintiff, with a sudden jerk causing her to be thrown against the car and her feet to be dragged on the ground for several feet, according to Ferguson. She fell just north of the sidewalk and the street car proceeded across the Illinois Central tracks. The other theory was that plaintiff while the car was in motion, hurried in front of it and boarded it while it was moving and that she lost her hold on the grab iron and fell to the ground. Again there were inconsistencies and contradictions bearing on whether Ferguson talked to the motorman; which way a passenger witness and the conductor were facing at the time; whether the car was backed up; and whether the starting bells had rung. We see no reason for setting aside inferences of the jury that the car should not have

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been started forward with a jerk nor until plaintiff had reached the platform safely; and that if a signal were given the motorman to start the car in motion, it was either done by the conductor observing plaintiff's plight, or without observing it when he should have.

Defendants agree that stopping a street car at a regular stopping place is an implied invitation to board it. Klinck v. Chicago City Railway Co., 262 Ill. 280. It was the obligation of the conductor and motorman not to start the car until they had exercised due diligence to protect plaintiff in her attempt to board the car after she was given the invitation. The North Chicago Street Railway v. Cook, 145 Ill. 551.

A medical witness in plaintiff's behalf testified that after the accident he found in addition to plaintiff's elbow condition, bruises which covered the buttocks and left hip; that thereafter plaintiff complained daily of pain all over including the inside of the abdomen; that June 30, pursuant to her complaining of persistent pain on the left side rendering her miserable and depressed, he made a complete vaginal examination on July 1st; and that plaintiff's hospitalization and operation followed. He said as early as June 23rd he diagnosed an appendage in the left side of the abdomen and that upon operating he took out the old scar and certain growths on the right side and on the left side found that the connection between the Fallopian tube and the uterus had been ruptured and separated and found tender serous adhesions which were a recent process. He gave his opinion that the condition of the left side of the abdomen could have been caused by the fall a month before the operation and that the condition on the right side could not have been. This opinion was given on the basis of his knowledge of the case and his treatment.

been started forward with a jerk nor until plaintiff had reached the platform safely; and that if a signal were given the motorman to start the car in motion, it was either done by the conductor observing plaintiff's plight, or without observing it when he should have.

Defendants argue that stopping a street car at a regular stopping place is an implied invitation to board it. Illinois v. Chicago City Railway Co., 232 Ill. 290. It was the obligation of the conductor and motorman not to start the car until they had exercised due diligence to protect plaintiff in her attempt to board the car after she was given the invitation. The North Chicago Street Railway v. Cook, 148 Ill. 551.

A medical witness in plaintiff's behalf testified that after the accident he found in addition to plaintiff's other condition, bruises which covered the buttocks and left hip; that thereafter plaintiff complained daily of pain all over including the inside of the abdomen; that June 30, pursuant to her complaints of persistent pain on the left side radiating her abdomen and depressed, he made a complete vaginal examination on July 1st; and that plaintiff's hospitalization and operation followed. He said as early as June 23rd he diagnosed an appendix in the left side of the abdomen and that upon operating he took out the old scar and certain growths on the right side and on the left side found that the connection between the fallopian tube and the uterus had been ruptured and separated and found tender serous adhesions which were a recent process. He gave his opinion that the condition of the left side of the abdomen could have been caused by the fall a month before the operation and that the condition on the right side could not have been. This opinion was given on the basis of his knowledge of the case and his treatment.

By inference, at least, he eliminated causes other than the accident as responsible for the condition on the left side. Reasons for his opinion were fully given. His knowledge of the case included information of an operation for ovarian cysts and appendicitis in 1928, and a miscarriage in September 1943. His opinion was corroborated by an expert gynecologist who said that since plaintiff had complained of no pain in the abdomen before the accident, the inference was that the cause was limited to the accident. This doctor expressly eliminated the miscarriage as a cause.

Defendants contend that the testimony did not eliminate these prior events as causes in whole or in part of the abdominal condition for which plaintiff was operated a month following the accident, and that the finding of the jury that the street car accident was the cause, is based on speculation and should not stand. In Support of this argument they cite Johnston v. City of Galva, 316 Ill. 598. That case is not helpful. There was no testimony there that the harm complained of was attributable to any one of several possible causes.

Defendants presented no physicians giving opinions contrary to those of plaintiff's physicians. They presented the pathologist who the day of the operation examined the organs which had been removed. His diagnosis was that the "tube" had been infected "a few weeks to any number of years" in the past; and that the ovarian cyst would take "many weeks to months" to develop. He said, "I did not find any evidence in my diagnosis connecting any of my findings with the injury." He later testified that on his examination he could not say whether the organ had been injured within a month.

We think the jury could properly find from the foregoing that the street car accident on June 3, 1944 was the proximate cause of the injuries to the organs in her left abdomen. Chicago Union Traction Co. v. May, 221 Ill. 530. There is no need to

By inference, at least, he eliminated causes other than the accident as responsible for the condition on the left side. Reasons for his opinion were fully given. His knowledge of the case included information of an operation for ovarian cysts and appendicitis in 1920, and a miscarriage in September 1944. His opinion was corroborated by an expert gynecologist who said that since plaintiff had complained of no pain in the abdomen before the accident, the inference was that the cause was limited to the accident. This doctor expressly eliminated the miscarriage as a cause.

Defendants contend that the testimony did not eliminate these prior events as causes in whole or in part of the abdominal condition for which plaintiff was operated a month following the accident, and that the finding of the jury that the street car accident was the cause, is based on speculation and should not stand. In support of this argument they cite Johnson v. City of Galva, 316 Ill. 308. That case is not helpful. There was no testimony there that the harm complained of was attributable to any one of several possible causes.

Defendants presented no physicians giving opinions contrary to those of plaintiff's physicians. They presented the pathologist who the day of the operation examined the organs which had been removed. His diagnosis was that the "tube" had been infected "a few weeks to any number of years" in the past; and that the ovarian cyst would take "many weeks to months" to develop. He said, "I did not find any evidence in my diagnosis connecting any of my findings with the injury." He later testified that on his examination he could not say whether the organ had been injured within a month.

We think the jury could properly find from the foregoing that the street car accident of June 3, 1944 was the proximate cause of the injuries to the organs in her left abdomen. Chicago Union Traction Co. v. Hay, 221 Ill. 520. There is no need to

comment on the cases defendant has cited on the question of aggravation of previous injuries and speculation in assessing damages. The declaration claimed that the left tube and ovary were removed as a direct and proximate result of defendant's negligence. This was sufficient to accommodate the damages assessed.

In view of the foregoing conclusions we find no merit in the contention that the damages awarded were excessive.

It is finally contended by defendants that instructions Nos. 9 and 13, given at plaintiff's request, were erroneously given and the giving of them constituted prejudicial error. Defendants admit that instruction No. 9 states a correct, legal rule, but say it was not justified on the facts in this case. We disagree. The instruction was not peremptory. It is based on plaintiff's theory that she attempted to board the standing street car. If the car was standing when she grasped the handrail and reached the step with both feet, defendants had a duty not to start the car until she was in a safe position. There was no necessity, under plaintiff's theory, to include the element of opportunity for defendants to perform the duty in an emergency. The instruction under consideration is in substance the same as that reviewed in Lundquist v. Chicago Rys. Co., 305 Ill. 106. Defendants say the objection made there, however, was different from that made here. We think the objections are substantially the same. The ruling in that case is our authority for approving the instruction here.

Instruction 13 is peremptory. It contains the necessary elements of plaintiff's case. We think "in the same or similar circumstances" clearly extends the meaning of "time and place in question" to the entire transaction, including the accident. The words, "was in a place where she had a right to be" are superfluous and ambiguous. The only serious objection we see is that the element of due care was imperfectly stated.

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In view of the foregoing conclusions we find no merit in the contention that the damages awarded were excessive.

It is finally contended by defendants that instructions Nos. 9 and 15, given at plaintiff's request, were erroneously given and the giving of them constituted prejudicial error. Defendants admit that instruction No. 9 states a correct, legal rule, but say it was not justified on the facts in this case. We disagree. The instruction was not peremptory. It is based on plaintiff's theory that she attempted to board the standing street car. If the car was standing when she crossed the handrail and reached the step with both feet, defendants had a duty not to start the car until she was in a safe position. There was no necessity, under plaintiff's theory, to include the element of opportunity for defendants to perform the duty in an emergency. The instruction under consideration is in substance the same as that reviewed in Lundquist v. Chicago Rys. Co., 208 Ill. 106. Defendants say the objection made there, however, was different from that made here. We think the objections are substantially the same. The ruling in that case is our authority for approving the instruction here.

Instruction 15 is peremptory. It contains the necessary elements of plaintiff's case. To "make in the same or similar circumstances" clearly extends the meaning of "time and place in question" to the entire transaction, including the accident. The words, "was in a place where she had a right to be" are superfluous and ambiguous. The only serious objection we see is that the element of due care was imperfectly stated.

This imperfection was removed by an instruction given at the request of defendant. C. & A. R. R. Co. v. Fletsam, 123 Ill. 518; and North Shore St. Ry. Co. v. Strathmann, 213 Ill. 252. In Hanson v. Trust Company, 380 Ill. 194, cited by defendant, the question was not of an imperfect statement of an element, but the entire lack of an element.

For the reasons given the judgment is affirmed.

JUDGMENT AFFIRMED.

LEWE, P.J. AND BURKE, J. CONCUR.

This imperfection was removed by an instruction given at the request of defendant. C. & A. R. R. Co. v. Pistana, 125 Ill. 318; and North Shore St. Ry. Co. v. Ottenheimer, 216 Ill. 292. In Hanson v. Trust Company, 230 Ill. 124, cited by defendant, the question was not of an imperfect statement of an element, but the entire lack of an element.

For the reasons given the judgment is affirmed.

JUDGMENT AFFIRMED.

LEWIS, P.J. AND BURKE, J. CONCUR.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

October Term, A.D. 1946

Term No. 46 0 4 Agenda No. 1

RUSSELL SAUVAGE, ET AL., Plaintiff-Appellees, -vs- VIRGINIA S. GALLAWAY, ET AL., Defendants-Appellants.	Interlocutory Appeal from the Circuit Court of Madison County, Illinois.

CULBERTSON, P. J.

This is an appeal from an order entered by the Court below allowing a "wage or salary" for RUSSELL SAUVAGE, Appellee (hereinafter called plaintiff) of $50.00 a week in connection with the management of an advertising business conducted pursuant to the terms of the Last Will and Testament of W. M. Sauvage, and in which order a certain security arrangement for the trust estate was likewise provided for. The appeal is apparently taken by appellant, VIRGINIA S. GALLAWAY (hereinafter called defendant), and her husband, M. C. GALLAWAY, who was named as trustee under the terms of the Last Will and Testament of W. M. Sauvage. A motion to dismiss the appeal was filed in this proceeding by the plaintiff on the ground that the appellants had not complied with the procedural steps necessary to give the Court jurisdiction. The motion has been taken with the case for consideration.

From the abstract of record and the briefs filed in this cause it becomes apparent that Wm. M. Sauvage died leaving his son, Russell Sauvage, plaintiff, and his daughter, Virginia Gallaway, as his beneficiaries, and in his Last Will and Testament left his advertising billboard business in trust for a period of ten years under the administration of a Board of five Trustees. All of the trustees had declined to serve and M. C. Gallaway (husband of the daughter, Virginia Gallaway) was designated as trustee. An effort had been made by the said trustee to sell the business to his wife, Virginia. The record does not clearly show that there had been a resignation of Gallaway as trustee, and as far as we are able to determine he may still be acting in that capacity. For the purpose of this case, however, it is only necessary to note that in June of 1944 the plaintiff, with the apparent approval of all parties, was designated as manager of the advertising business and required to report as to the operations to his sister, Virginia.

After that time the said M. C. Gallaway and his wife began operating a competing advertising business in Alton, and an injunction was issued as against the trustee in that proceeding (SAUVAGE vs. GALLAWAY, 66 N.E. (2nd) 740). During the intervening period plaintiff had continued to manage the business and at such time was apparently being paid only the sum of $40.00 per week, which had been provided that he be paid by the terms of his father's Will. The $40.00 weekly payment provided by the Will was conditioned on the plaintiff's remaining an employee of the advertising business. After the business had been operated by the plaintiff and showed a profit he asked the Court to allow him $50.00 per week as manager. There were a number of delays in determining such allowance. The order finally entered by the Chancellor

provided for payment of $50.00 per week to the plaintiff until he shall "cease to act as manager," in addition to the sum claimed by him as a legatee under the Last Will and Testament of W. M. Sauvage. It also provided for certain insurance and security for the trust estate if any sums by final judgment of the Court are determined to have been wrongfully paid to him or withheld by him, and likewise, provided that in the event the Court, on final judgment, should determine that he was not entitled to the payment of the sum of $50.00 per week and it shall be held to have constituted a wrongful payment to or withholding by him, was to be repaid to the trust estate from the proceeds of the insurance policy which was assigned to the trust estate, or from the contingent interest of the plaintiff as a beneficiary of the estate, if he survived. There was evidence that the predecessor and manager in the business had been paid a wage of $50.00 per week and that the trustee himself had once been manager of the business and had been paid $100.00 per week as such manager.

While a number of objections are raised by the appellants, it is substantially contended that the plaintiff was entitled only to pay himself $40.00 per week while acting as manager of the advertising business, and that it was error on the part of the Court to fix any compensation for him in advance of performance of his duties as manager. While there is serious question as to whether this appeal is properly taken (in view of the type of order involved), we do not believe that the issue before us either requires or deserves extended discussion. It is apparent that the $50.00 a week is a fair and reasonable compensation for the management of the trust business and that the Court below had ample authority to enter the type of order which was entered in this cause.

It provided merely for securing advances, subject to future allowance. If the trustee himself had operated the business he would have been entitled to a reasonable manager's compensation for so doing. We know of no reason why the Court should be deprived of the right to provide for payment of a reasonable compensation to a Court-appointed manager. The record shows that the plaintiff had rendered almost two years of service with a gross profit to the business of over $15,000.00, and that the $50.00 per week was a reasonable salary for the manager for such service. What the order did, in substance, was to permit the plaintiff to advance to himself the amount of such salary after securing the trust estate and provided that the question of such salary was still open and that if it were ultimately decided against plaintiff, the sum of the advancements would be charged against his share of the trust estate and he was also required to assign to the trust estate a paid-up life insurance policy of $20,000.00, which was double the amount he could draw at $50.00 a week for the balance of the trust period, as a protection to the trust estate against the possibility that he would not survive the remaining years of the trust and that his minor daughter, rather than himself would be the ultimate beneficiary.

We do not see how any showing of prejudice is made to any of the parties by the entry of such order and do not believe that the Chancellor abused his discretion in entering the order appealed from.

The order of the Circuit Court of Madison County will, therefore, be affirmed.

Order affirmed.

Justices Bartley and Smith concur.

Abstract.

Gen. No. 10,100. Agenda No. 10.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT.

OCTOBER TERM, A. D. 1946.

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	)	
vs.	)	Writ of Error to County Court, Winnebago County.
PHILIP CIMINO, Plaintiff in Error.	)	

F. G. WOLFE: P.J.

The States Attorney of Winnebago County filed in the County Court of said County, an information charging, that Philip Cimino of said County, on the 18th day of November 1945, did unlawfully and wilfully, with a deadly weapon, to-wit a certain pistol, in and upon Sam DiStephano did make an assault with the intent of inflicting upon the person of the said Sam DiStephano a bodily injury, no considerable provocation for such assault then and there appearing said assault showing an abandoned and malignant heart. The defendant was arrested and brought before the court for a trial by jury. Evidence was heard, and at the close of all of the evidence, the defendant entered a motion for the court to direct a verdict of not guilty. This motion was denied. The jury found the defendant guilty, as charged in the information, and assessed a fine of $1,000.00. The Court

sentenced the defendant to pay a fine of $1,000.00 and costs of the prosecution. It is from this judgment that the case is brought to this Court by a writ of error.

The complaining witness, Sam DiStephano and the defendant, Philip Cimino, were playing cards at the Sons of Italy Club in the City of Rockford. They got into an argument over the card game and blows were struck by each of them at that time. DiStephano was a member of the club, but Cimino was not. After the trouble between these men, Cimino was ejected from the club, but DiStephano stayed there for about one-half hour.

Later, DiStephano was standing in front of a theatre cleaning his pipe, with his pocket knife, when Cimino came along and according to DiStephano's testimony, Cimino pulled out a revolver, stuck it in the side of DiStephano, and ordered him back into the alley where he hit him over the head several times with the gun. Cimino denies that he was the aggressor in this trouble, but claims that DiStephano challenged him to a fight, and while fighting, he pulled out a knife and it was then that Cimino pulled out his gun and hit DiStephano over the head with it. Evidently the jury believe DiStephano's version of how the trouble occurred instead of believing Cimino.

After the trouble between the men, DiStephano went back to the club and was then taken to a fire station. His clothes were bloody, and he had cuts on his head and face. It required ten stitches to close these wounds inflicted by Cimino. From a reading of the abstract, we are convinced that the jury properly found that the assault was made as charged in the information.

The plaintiff in error has assigned 13 reasons why the judgment of the trial court should be reversed, but has argued only five, and we will consider those only that have been argued. It is first insisted that the People's Instruction No. 6 was erroneous, because it lead the jury to believe that the Court was referring particularly to the testimony of the defendant, and thereby the defendant's rights were prejudiced. This instruction is practically verbatim, as the one given in the case of the People vs. Aldrich, 224 Ill. page 622 at Page 629. The plaintiff in error claims that there are two separate instructions combined in this instruction, and therefore it is misleading. He admits that if the instructions were given separately, that they would then be good. As to whether the jury would be misled in regard to the wording of the instruction, the Court has this to say in regard to the one given in the People vs. Aldrich, supra: "The language of the instruction does not mean that the jury should disregard the defendant's testimony if some other witness had wilfully and corruptly testified falsely to some material fact and issue, and we cannot believe that any one with intelligence enough to serve on the jury would understand the instructions as announcing a rule so unreasonable and absurd." We find no merit in the criticism of the given instruction No. 6.

It is claimed that the assessing of a fine of $1,000.00 against the defendant, is a cruel and an unusual penalty. The Statute provides for such an offense that a defendant be fined not less than twenty-five dollars nor more than one thousand dollars, or imprisoned in jail not to exceed one year, or both such fine and imprisonment.

The jury in assessing the fine of $1,000.00 came far short of fixing the maximum penalty that they could have fixed under the Statute. We find no merit in the contention that the fine is excessive.

It is claimed that the plea of self-defense was legally proven and was a full defense to the prosecution. It was the province of the jury to pass upon all controverted questions of fact and they were to be the judges of whether the evidence shows that the defendant acted in self-defense. By their verdict, they have found that he was not so acting, and as before stated, we think the evidence justified their finding.

During the trial, the clothing worn by DiStephano at the time of the assault, was admitted in evidence. It was torn and bloodstained. There was no objection to the admittance of the clothes in evidence. As the jury retired to consider the evidence, the Court permitted these bloody clothes to be taken to the jury room. It is now claimed that the Court erred in so doing. The plaintiff in error cites no case, or authority to support this contention. In the case of The People vs. Morris, 254 Ill. page 559, bloody bed clothing and other articles found within the room where a murder had been committed, were allowed to be taken to the jury room when the jury retired. The Supreme Court there stated: "We are of the opinion that the time and manner in which objections of this character shall be displayed in the presence of the jury is a matter wholly within the sound discretion of the Court, and we are unable to see anything in the record sufficient to warrant us in holding that such discretion was abused in the present case." In the case before us, the Court did not err in allowing these exhibits to go to the jury room.

It is also claimed that the Court erred in refusing to give defendant's instruction No. 2. It is not every allegation in an information that must be proven beyond a reasonable doubt, but it is every material allegation that must be so proven. This instruction is faulty by the omission of the word material. Even if it had been in proper form, there were other instructions given that fully informed the jury of what the State must prove before the jury would be justified in finding the defendant guilty.

We find no reversible error in the case, and the judgment of the trial court is affirmed.

Judgment affirmed.

Gen. No. 10,104. Agenda No. 13.

IN THE

APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT.

OCTOBER TERM, A. D. 1946.

ESSIE THADEN, Plaintiff, vs. GUY HARTMAN, Defendant.	No. 26,739.	
GUY HARTMAN and WORTH WINDMILLER, Plaintiffs-Appellants, vs. ESSIE THADEN and MANLEY THADEN, Defendants-Appellees.	No. 26,769.	Appeal from the Circuit Court of Kankakee County.

F. G. WOLFE: P. J.

Essie Thaden and Manley Thaden, her husband, were in an automobile collision with a car owned and driven by Guy Hartman. Worth Windmiller was a guest in the Hartman car. Manley Thaden was driving Essie Thaden's car. The collision occurred in the City of Kankakee on the 3rd day of March 1945.

Essie Thaden started a suit against Guy Hartman in a Justice of Peace Court in which she obtained a judgment for damages to her car. This case was appealed to the Circuit Court by the

defendant, Hartman. Guy Hartman and Worth Windmiller started suit against Essie Thaden and Manley Thaden in the Circuit Court of Kankakee County for personal injuries, and damages to the Hartman car. In that Court the two cases were consolidated and tried before the Court without a jury. At the conclusion of the hearing, the Court found the issues in favor of Essie Thaden, and assessed her damages at $475.00. In the case of Guy Hartman and Worth Windmiller against the Thadens, the Court found the issue in favor of the defendants, Thaden. It is from these judgments that an appeal has been prosecuted to this court.

The only assignment of error by the appellant is that there is no evidence to sustain the judgment of the Court in either of the cases, and that the Court erred in entering judgment in favor of the appellees. This case is like all contested ones about how the accident occurred, the plaintiffs tell one story, and the defendants another. The trial court had to decide which story was the more reasonable. He was in a much better position to weigh the evidence of the various witnesses, than a court of review, and unless his findings are contrary to the manifest weight of the evidence, we would not be justified in reversing the judgment. From a review of the evidence, we are satisfied that the evidence sustains the finding of the trial court, and the judgment appealed from is hereby affirmed.

Judgment affirmed.

Q.K. Geo. P.

Abstract 330 I.A. 462

Gen. No. 10107. Agenda No. 16.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, 1946.

DELIA McGRATH AND ALICE LAWLESS, Plaintiffs-Appellees, vs. FRANK FLUECH AND DELBERT FLUECH, Defendants-Appellants.	Appeal from Judgment of Circuit Court, LaSalle County.

F. G. WOLFE: P. J.

On September 9, 1943, Delbert Fluech in a motor truck owned jointly by himself and his brother, Frank Fluech, was driving south on a gravel road toward an intersection with an east and west public highway, north of the Village of Lostant in the County of LaSalle, Illinois. At the same time Delia McGrath was driving her Dodge Coupe in an easterly direction on said east and west highway. Riding with Mrs. McGrath was her sister, Alice Lawless. The car and the truck collided at the intersection. Alice Lawless suffered personal injuries, and Delia McGrath's automobile was damaged.

A suit was started in the Circuit Court of LaSalle County, by Delia McGrath and Alice Lawless, against Frank Fluech and Delbert Fluech. Delia McGrath claimed damages for her automobile, and Alice

Lawless for personal injuries she had suffered in the collision. The case was tried before a jury who found for the plaintiffs, and assessed Delia McGrath's damages at $542.34, and Alice Lawless' damage at $750.00. Judgment was entered on the verdict, and the defendants have perfected an appeal to this Court.

It is contended by the appellants that the verdict is contrary to the manifest weight of the evidence, and that the verdict and judgments should have been in their favor. It is also contended that the Court, in giving instructions Nos. 5, 9 and 10 for the plaintiffs, committed reversible error, and therefore the judgment should be reversed.

The accident happened while the truck was being driven in a southerly direction, and the plaintiffs' car in an easterly direction. It is claimed by the appellees that the McGrath car had the right-of-way over the truck, and therefore plaintiffs' given instruction No. 5 is proper. The instruction is as follows: "The Court instructs the jury that under the law of Illinois vehicles travelling upon the public highways shall give the right-of-way to vehicles approaching along intersecting highways from the right and shall have the right-of-way over those approaching from the left and in determining which vehicle had the right-of-way you must consider the speed of the vehicles and their distance from the point of collision and therefore if you believe from the testimony and evidence in this case, the speed of the vehicles and their distance from the point of collision that the car of Delia McGrath had the right-of-way then your verdict should be in favor of the plaintiffs."

It will be observed that this instruction directs a verdict. It is a well settled proposition of law that where an instruction directs a verdict, all the elements necessary to sustain such a verdict, should be contained in the instruction. O'Day vs. Crabb, 269 Illinois 123; Illinois Iron and Metal Company vs. Weber, 196 Ill., at 526. The instruction No. 5 is fatally defective in that it omits essential elements which the burden of proof was on the plaintiffs to prove by a preponderance of the evidence. There is no mention that the plaintiffs must prove they were in the exercise of ordinary care for their own safety, nor is there mention of any negligence on the part of the defendants that was the proximate cause of the injuries complained of. In the case of Hanson vs. Trust Company, 380 Ill. 194, a similar instruction was given. In discussing it, the Court uses this language: "The effect of the instruction was to tell the jury that if they found from the evidence that the matters stated in the instruction had been proven, then they should find for the plaintiff and this without regard to what the evidence showed as to plaintiff's exercise of due care."

Complaint is also made in regard to plaintiffs' given instructions 9 and 10. These instructions are also erroneous, as each of them fails to state that the amount of damage must be based on the preponderance of the evidence relative to the damage that either of the plaintiffs had sustained. Neither of the instructions have any reference to the damage claimed in the complaint in the case. The trial court erred in giving plaintiffs' instructions Nos. 5, 9 and 10.

As to whether the verdict of the jury is contrary to the weight of the evidence, we express no opinion. The judgment of the trial court is hereby reversed, and the cause remanded.

Judgment reversed and cause remanded.

43958

MOLLIE RUBIN, Appellee,	)	APPEAL FROM MUNICIPAL
v.	)	COURT OF CHICAGO.
M. S. WOLFSON, Appellant.	)	

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is a forcible detainer action brought by plaintiff, Mollie Rubin, against the defendant, M. S. Wolfson. The case was tried by the court without a jury. The issues were found in favor of plaintiff and judgment was entered against defendant ordering him to deliver to plaintiff possession of a certain residential apartment. The defendant appeals.

Plaintiff as lessor and defendant as lessee entered into a written lease on August 27, 1943 for the occupancy of the third floor apartment at 733 Roscoe street, Chicago, Illinois, for the period commencing September 1, 1943 and ending on September 30, 1944, at a monthly rental of $42.50. The premises involved herein are occupied by defendant's father and mother. On April 29, 1946 the Rent Director of the Office of Price Administration, pursuant to plaintiff's petition and in accordance with the Federal Rent Control Act, issued a "certificate relating to eviction." This certificate authorized plaintiff to institute an action under the law of this state to evict the defendant because the plaintiff desired to place her son in the apartment. On May 11, 1946 plaintiff served a written notice on defendant that his tenancy would terminate on June 30, 1946. Pursuant to said notice this forcible detainer proceeding was instituted on July 1, 1946.

The only witnesses were plaintiff and defendant. Plaintiff testified in substance that she prepared a lease, dated August 3, 1944, covering the aforesaid apartment for the period from October 1, 1944 to September 30, 1945 and forwarded same to

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MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

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The only witnesses were plaintiff and defendant. Plaintiff testified in substance that she prepared a lease, dated August 3, 1944, covering the aforesaid apartment for the period from October 1, 1944 to September 30, 1945 and forwarded same to

defendant for his approval and signature; that after defendant's receipt of the lease he inserted therein this provision: "Lessor agrees to allow one month's rent the first month of this lease towards decorating the apartment which is the same provision as had in the previous lease"; that he then signed the lease and returned it to her by mail; that she refused to sign the lease as modified by defendant; and that on the same day that said lease was returned to her by defendant her daughter at her direction prepared two letters in longhand, each of which read as follows:

"September 6, 1944

Mr. M. S. Wolfson
226 N. Clinton St.
Chicago, Illinois

Dear Mr. Wolfson:

Since my lease which I sent to you was not acceptable and you saw fit to make changes in it, starting October 1, 1944 the apartment at 733 Roscoe will have a lease from month to month.

Yours very truly,"

Plaintiff further testified that she signed one of the two letters which she referred to as the "original", inserted said letter in an envelope which she addressed to defendant, placed a postage stamp thereon and deposited same in a United States post office mail box and that she retained the other letter as a "copy" (hereinafter referred to as the copy).

It should be stated at this point that plaintiff's attorney served notice on defendant's attorney to produce what plaintiff referred to in her testimony as the original of the two letters and that when same was not produced the copy was admitted in evidence as plaintiff's exhibit 5. Below the body of the copy of the letter appears plaintiff's name, "Mollie Rubin", printed in ink. Plaintiff denied that her name was printed on the copy when she turned it over to her attorney. It was stipulated that plaintiff's name was printed on the copy by her attorney on the morn-

defendant for his approval and signature; that after defendant's receipt of the lease he inserted therein this provision: "Lessor agrees to allow one month's rent the first month of this lease towards decorating the apartment which is the same provision as had in the previous lease"; that he then signed the lease and returned it to her by mail; that she refused to sign the lease as modified by defendant; and that on the same day that said lease was returned to her by defendant her daughter at her direction prepared two letters in longhand, each of which read as follows:

"September 6, 1944

Mr. W. S. Wilson
226 N. Clinton St.
Chicago, Illinois

Dear Mr. Wilson:

Since my lease which I sent to you was not acceptable and you saw fit to make changes in it, effective October 1, 1944 the apartment at 723 Tooze will have a lease from month to month.

Yours very truly,"

Plaintiff further testified that she signed one of the two letters which she referred to as the "original", inserted said letter in an envelope which she addressed to defendant, placed a postage stamp thereon and deposited same in a United States post office mail box and that she retained the other letter as a "copy" (hereinafter referred to as the copy).

It should be stated at this point that plaintiff's attorney served notice on defendant's attorney to produce what plaintiff referred to in her testimony as the original of the two letters and that when same was not produced the copy was admitted in evidence as plaintiff's exhibit 5. Below the body of the copy of the letter appears plaintiff's name, "Willie Mahin", printed in ink. Plaintiff denied that her name was printed on the copy when she turned it over to her attorney. It was stipulated that plaintiff's name was printed on the copy by her attorney on the morn-

ing of the trial.

Defendant testified in substance that he never received the original of the copy of the letter received in evidence as plaintiff's exhibit 5; that he never saw the copy until same was shown to him about a week before the trial; that at the time he saw the copy it was unsigned; that at no time was he advised of a change in the nature of his tenancy; that the only time he spoke to plaintiff was in the early part of September 1944 and his conversation with her at that time was with reference to their dispute over the decorating of the apartment and the provision he inserted in the lease with respect thereto; and that nothing was ever mentioned about the termination of the tenancy or a change in the form of the tenancy.

The only question presented for our determination is whether the finding and judgment of the trial court were against the manifest weight of the evidence. Defendant was the lessee of the premises under a written lease for a period of thirteen months ending September 30, 1944. The parties were unable to agree on the terms of the new lease and it was not signed by plaintiff. According to plaintiff, she notified defendant by letter on September 6, 1944, which was prior to the expiration of the original lease, that "the apartment at 733 Roscoe will have a lease from month to month" starting October 1, 1944, because of defendant's refusal to accept the new written lease which she had tendered to him for the year commencing October 1, 1944. Defendant denied receiving the letter plaintiff claims to have mailed to him on September 6, 1944 notifying him that his tenancy would be from month to month commencing October 1, 1944.

If defendant's tenancy was from month to month commencing October 1, 1944, as plaintiff contends, the thirty day notice which she served on him to terminate his tenancy was sufficient. Defendant's position is that, since he did not receive the notice

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Defendant testified in substance that he never received the original or the copy of the letter received in evidence as plaintiff's exhibit 5; that he never saw the copy until same was shown to him about a week before the trial; that at the time he saw the copy it was unsigned; that at no time was he advised of a change in the nature of his tenancy; that the only time he spoke to plaintiff was in the early part of September 1944 and his conversation with her at that time was with reference to their dispute over the decorating of the apartment and the provision he inserted in the lease with respect thereto; and that nothing was ever mentioned about the termination of the tenancy or a change in the form of the tenancy.

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If defendant's tenancy was from month to month commencing October 1, 1944, as plaintiff contends, the thirty day notice which she served on him to terminate his tenancy was sufficient. Defendant's position is that, since he did not receive the notice

which plaintiff claims she mailed to him as to the month to month tenancy and since he remained in possession of the apartment after the expiration of the original lease and continued to pay the amount of rent stipulated therein without any new contract as to his tenancy having been made and plaintiff accepted said rent from him, he held over as a tenant from year to year and plaintiff could not terminate his tenancy except by a sixty day notice.

The sole issue in this case was whether defendant's tenancy after the expiration of the original written lease was from month to month or from year to year. The only evidence presented to aid the trial court in determining that issue was the testimony of plaintiff that the letter creating the month to month tenancy was written and mailed by her to defendant and his testimony that he did not receive that letter.

Defendant points out in his brief what he considers a number of "peculiar facts and circumstances about the letter," which he contends tended to impeach plaintiff or to render improbable her testimony that she mailed the letter to him changing the form of his tenancy. We have carefully examined all the evidence in the record and, after a careful analysis of same, are of the opinion that there is no merit in defendant's instant contention.

The only evidence in the record bearing on the sole issue in the case is on the one hand the affirmation of plaintiff that the letter in question was written and properly mailed to defendant and on the other hand his denial that he ever received that letter.

There is no substantial dispute as to the law applicable to the facts of this case. "The rule is that proof of the due mailing of a letter raises the presumption of its receipt, and when the receipt thereof is denied, the only effect is to raise an issue of fact." Talmage v. Union Central Life Insurance Company,

which plaintiff claims she mailed to him as to the month to month tenancy and since he remained in possession of the apartment after the expiration of the original lease and continued to pay the amount of rent stipulated therein without any new contract as to his tenancy having been made and plaintiff accepted ~~xxxx~~said rent from him, he held over as a tenant from year to year and plaintiff could not terminate his tenancy except by a sixty day notice.

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315 Ill. App. 623. In Wakenight v. West, 217 Ill. App. 199, the court said at p. 201:

"It is true, that this presumption may be rebutted by evidence showing a letter mailed was not actually received. And in this case the appellant testified that he did not receive the letter; and if the jury had believed the appellant, the presumption of law would have been rebutted; but it is evident that the jury did not believe the appellant, and it was the province of the jury not to do so, if they thought his testimony in that regard unworthy of belief. In determining this matter, undoubtedly the jury took into consideration the circumstances, which had a bearing upon the question of his veracity, such as his interest in the result of the case, his demeanor and appearance, and conduct as a witness ***."

Defendant asserts in effect that plaintiff's testimony concerning the original letter and the copy thereof was fabricated "for the specific purpose of sustaining the service of a thirty day notice to terminate this tenancy." It could just as well be said that defendant fabricated his testimony that he did not receive the letter.

Since the testimony of neither party was corroborated or impeached and the testimony of either of them could have been readily fabricated, the controlling factor in the determination by the trial judge of the question as to whether defendant's testimony that he did not receive the letter was sufficient to overcome the presumption of its receipt by him which arose from plaintiff's testimony that it was properly mailed by her, must necessarily have been the credence he accorded to the testimony of the respective parties. The question as to which of them the trial judge deemed most worthy of belief was peculiarly a matter for him to determine. He saw and heard them testify and had an opportunity to observe their conduct and demeanor while testifying. The finding of the trial judge indicated that he believed plaintiff's testimony and under the circumstances we would not be warranted in disturbing such finding or the judgment entered thereon as being against the manifest weight of the evidence.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Friend and Scanlan, JJ., concur.

315 Ill. App. 623. In Schwenkhut v. Dept. 217 Ill. App. 199, the court said at p. 201:

"It is true, that this presumption may be rebutted by evidence showing a letter mailed was not actually received. And in this case the appellant testified that he did not receive the letter; and if the jury had believed the appellant, the presumption of law would have been rebutted; but it is evident that the jury did not believe the appellant, and it was the province of the jury not to do so, if they thought his testimony in that regard unworthy of belief. In determining this matter, undoubtedly the jury took into consideration the circumstances which had a bearing upon the question of his veracity, such as his interest in the result of the case, his demeanor and appearance, and conduct as a witness etc."

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The judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Friend and Scanlan, JJ., concur.

43640

J. H. RHODE, doing business as OAK PARK REALTY COMPANY, Appellee,	)	APPEAL FROM SUPERIOR
v.	)	COURT, COOK COUNTY.
MILDRED NOVAK, Appellant.	)	

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an adverse judgment in the sum of $562.50 for commission found to be due plaintiff, a real estate broker, for procuring prospective purchasers ready, willing and able to buy defendant's home in Oak Park, Illinois, on terms alleged to have been agreeable to defendant.

It appears that in the fall of 1944 the defendant, Mildred Novak, listed for sale her residence at 531 South Elmwood avenue, Oak Park, Illinois, with plaintiff's representative, agreeing to pay the regular Chicago Real Estate Board commission of 5 per cent. On October 21, 1944 Joseph Metzner, who was associated with plaintiff, procured Walter J. and Juliette B. Gordon as prospective purchasers, who offered $11,250 for the property. Plaintiff then prepared a real estate sales contract which he discussed with defendant, who offered to sell for $11,250 and directed plaintiff to write on the bottom of the contract the following legend: "We will sell our property at 531 S. Elmwood Ave., Oak Park, Illinois, as at price of $11,250.00." The Gordons agreed to pay that sum, signed the contract, and deposited $300 as earnest money with plaintiff as broker. A copy of the contract was then turned over to defendant. Later A. E. Kuto, defendant's adviser, called Metzner, asking him to pick up the contract at defendant's home and

J. K. F (DOE), doing business as OAK PARK TRUST COMPANY, Appellee,	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
v.	
MILDRED COAX, Appellant.	

MR. JUSTICE TRUMBO delivered the opinion of the court.

Defendant appeals from an adverse judgment in the sum of $362.50 for commission found to be due plaintiff, a real estate broker, for procuring prospective purchasers ready, willing and able to buy defendant's home in Oak Park, Illinois, on terms alleged to have been acceptable to defendant.

It appears that in the fall of 1944 the defendant, Mildred Coax, listed for sale her residence at 324 South Elmwood Avenue, Oak Park, Illinois, with plaintiff's representative, agreeing to pay the regular Chicago Real Estate Board commission of 5% per cent. On October 21, 1944 Joseph Detmer, who was associated with plaintiff, procured Walter J. and Juliette G. Gordon as prospective purchasers, who offered $11,250 for the property. Plaintiff then prepared a real estate sales contract which he discussed with defendant, who offered to sell for $1,250 and directed plaintiff to write on the notes of the contract the following legend: "We will sell our property at 324 S. Elmwood Ave., Oak Park, Illinois, as at price of $11,000.00." The Gordons agreed to pay that sum, signed the contract, and deposited $500 as earnest money with plaintiff as broker. A copy of the contract was then turned over to defendant. Later A. E. Lutz, defendant's adviser, called Detmer, asking him to pick up the contract at defendant's home and

informing him that he (Kuto) had all the necessary documents to furnish good title. When, in December 1944, defendant refused to consummate the deal, the Gordons made a demand on her, but without avail, saying that they were ready, able and willing to comply with the terms of the agreement at the stipulated sum of $11,250. When defendant subsequently refused to pay plaintiff's commission for his services as broker, suit was instituted.

After the proceeding was filed plaintiff, on June 15, 1945, had leave to amend instanter his complaint, and defendant was ordered to answer within five days but failed to do so. Thereafter on June 26, 1945 plaintiff moved for summary judgment, supporting his motion by affidavits. Defendant having filed no counter-affidavits or motion to strike, the court entered the judgment, from which this appeal is taken, in the sum of $562.50.

July 23, 1945 defendant's attorney was given leave to withdraw, and the present counsel were substituted. At the same time they filed defendant's motion to vacate the judgment, alleging for the first time that "at all times she [defendant] stated that a sale was contingent upon plaintiff procuring for her a suitable apartment for herself and family, which plaintiff, through said agent, agreed to do." The written contract contains no such provision, and there is no report of proceedings from which any such evidence could be considered. It should be noted, however, that in paragraph 4 of defendant's petition to vacate the judgment, she admits that she signed the agreement to sell her property at $11,250. After defendant's petition had been filed plaintiff was given 20 days to answer or otherwise reply thereto, and accordingly on August 10, 1945 filed a notice of motion to strike the petition, copies of

informing him that he (Kato) had all the necessary documents to furnish good title. Then, in December 1944, defendant refused to consummate the deal, the foregoing were a matter of her, but without avail, saying that they were really willing and willing to comply with the terms of the agreement at the stipulated sum of $11,250. When defendant subsequently refused to pay plaintiff's commission for his services as broker, suit was instituted.

After the proceeding was filed plaintiff, on June 15, 1945, had leave to amend instanter his complaint, and amendment was ordered to answer within five days but failed to do so. Thereafter on June 26, 1945 plaintiff moved for summary judgment, supporting his motion by affidavits. Defendant having filed no counter-affidavits or motion to strike, the court entered the judgment, from which this appeal is taken, in the sum of $[illegible].

July 23, 1945 defendant's attorney was given leave to withdraw, and the present counsel was substituted. At the same time they filed defendant's motion to vacate the judgment, alleging for the first time that "at all times the [defendant] stated that a safe warrantyment upon plaintiff producing for her a suitable apartment for herself and family, which plaintiff, through said agent, agreed to do." The written contract contains no such provision, and there is no proof of proceedings from which any such evidence could be considered. It should be noted, moreover, that in her proof of defendant's petition to vacate the judgment, she admits that she signed the agreement to sell her property at $11,250. After defendant's petition had been filed plaintiff was given 20 days to answer or otherwise reply thereto, and accordingly on August 10, 1945 filed a notice of motion to strike the petition, copies of

which were sent to defendant's counsel. Later on September 14, 1945 the court entered an order denying defendant's motion to vacate the judgment.

As one of the two grounds urged for reversal defendant contends in her brief that the court erred in entering the summary judgment, but on oral argument her counsel stated that he did not rely on that point, leaving only the contention that plaintiff did not secure a buyer for the property ready, willing and able to purchase on the terms fixed by her. The gravamen of this contention is that the Gordons offered to pay $11,000 for the property, subject to the proration of 1944 taxes, and the defendant was willing to take $11,250 without any agreement to permit the purchasers to prorate the taxes. So far as the discrepancy of $250 in the purchase price of the property is concerned, defendant's contention is utterly untenable because the agreement signed by her contains the notation that she was willing to sell the property at $11,250, and the showing made by plaintiff clearly indicates that the Gordons were willing to pay that sum. With respect to the prorating of taxes, the contract which defendant signed provides that the sale would be subject to "general taxes for the year 1944 and subsequent years," which is simply another way of saying that the general taxes would be prorated. The allegation in defendant's petition to vacate the judgment, namely, that the "sale was contingent upon plaintiff procuring for her a suitable apartment for herself and family, which plaintiff, through said agent, agreed to do," is nowhere mentioned in the contract or contained in any of the prior pleadings, and since defendant does not present any report of proceedings of what occurred before the trial judge, we are precluded from considering it.

which were sent to defendant's counsel. Later on September 14, 1945 the court entered an order denying defendant's motion to vacate the judgment.

As one of the two grounds urged for reversal defendant contends in her brief that the court erred in entering the summary judgment, but on oral argument her counsel stated that he did not rely on that point, leaving only the contention that plaintiff did not secure a buyer for the property ready, willing and able to purchase on the terms fixed by her. The gravamen of this contention is that the Gordons offered to pay $11,000 for the property, subject to the proration of 1944 taxes, and the defendant was willing to take $11,250 without any agreement to permit the purchasers to prorate the taxes. So far as the discrepancy of $250 in the purchase price of the property is concerned, defendant's contention is utterly untenable because the agreement signed by her contains the notation that she was willing to sell the property at $11,250, and the showing made by plaintiff clearly indicates that the Gordons were willing to pay that sum. With respect to the prorating of taxes, the contract which defendant signed provides that the sale would be subject to "general taxes for the year 1944 and subsequent years," which is simply another way of saying that the general taxes would be prorated. The allegation in defendant's petition to vacate the judgment, namely, that the "sale was contingent upon plaintiff procuring for her a suitable apartment for herself and family, which plaintiff, through said agent, agreed to do," is nowhere mentioned in the contract or contained in any of the prior pleadings, and since defendant does not present any report of proceedings of what occurred before the trial judge, we are precluded from considering it.

The legal aspects of this controversy present no serious question. The law is well settled that where a broker is authorized to procure a purchaser for an owner's property upon terms fixed by the owner, and secures such a purchaser who is ready, willing and able to buy upon the terms prescribed, the broker is entitled to his commission. The complaint, the written contract and the affidavits in support of the summary judgment, all justify the conclusion that defendant was willing to sell her property for $11,250 and that the Gordons agreed to buy at that price. Plaintiff is therefore entitled to judgment, and we are of opinion that the finding and judgment of the trial court should therefore be sustained. It is so ordered.

FINDING AND JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

The legal aspects of this controversy present no serious question. The law is well settled that where a broker is authorized to procure a purchaser for an owner's property upon terms fixed by the owner, and secures such a purchaser who is ready, willing and able to buy upon the terms prescribed, the broker is entitled to his commission. The complaint, the written contract and the affidavits in support of the summary judgment, all justify the conclusion that defendant was willing to sell her property for $11,250 and that the parties agreed to buy at that price. Plaintiff is therefore entitled to judgment, and we are of opinion that the finding and judgment of the trial court should therefore be sustained. It is so ordered.

FINDING AND JUDGMENT AFFIRMED.

Sullivan, P. J., and Hamlin, J., concur.

43652

RICHARD K. MAGID, Appellee, v. DREXEL NATIONAL BANK, a corporation, Appellant.	330 I.A. 613 APPEAL FROM CIRCUIT COURT, COOK COUNTY.
RICHARD K. MAGID, Appellee, v. NATIONAL BANK OF HYDE PARK, a corporation, Appellant.	

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

This appeal was consolidated with No. 43651, by order entered on April 3, 1946. The facts and circumstances of both cases are fully set forth in case No. 43651, wherein an opinion has this day been filed.

For the reasons indicated in that opinion, which are all applicable to this proceeding, the finding and judgment of the Circuit Court is reversed.

FINDING AND JUDGMENT REVERSED.

Sullivan, P. J., and Scanlan, J., concur.

43733

330 I.A. 614

CHARLES S. WECHTER, Appellant,	
v.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
CHICAGO TITLE AND TRUST COMPANY, a Trustee, under deed of trust dated as of December 8, 1927, dated November 15, 1927, and CHESTNUT-MICHIGAN COMPANY, a corporation, Appellees.	

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order of the Superior Court dismissing his complaint for want of equity after a hearing in open court by the chancellor limited solely to the issues raised by supplemental pleadings, namely, (a) the reasonableness of the fees and charges of the defendant trustee, and (b) the plaintiff's claim for the allowance of attorneys' fees and expenses.

From the opinion in a prior proceeding between the same parties, which was determined adversely to plaintiff and affirmed by the Supreme Court in Wechter v. Chicago Title & Trust Co., 385 Ill. 111, it appears that on November 15, 1927 Daniel E. Sawyer, the owner of the fee-simple title to real estate located at the southwest corner of Michigan avenue and East Chestnut street in Chicago, executed a lease demising the property to the Michigan-Chestnut Building Corporation for a term of 99 years ending November 14, 2026, at a yearly rental of $70,125, plus the payment of taxes and an annual fee of $3000 to the Chicago Title and Trust Company, which was to become trustee and lessor. The lease provided that the lessee was to establish and maintain a $1,000,000 depreciation fund in quarter-annual installments which was to provide for the retirement of land-trust certificates and for depreciation; that the lessee was to demolish the improvements then on the premises and, with the pro-

CHARLES S. WEBSTER, appellee,	
v.	Appeal from Circuit Court.
CHICAGO TITLE AND TRUST COMPANY, a trustee, under trust of trust dated as of December 1, 1927, dated November 15, 1927, and CONSUMERS-STUDIOS COMPANY, a corporation, appellees.	Cook. Cook County.

MR. JUSTICE THOMAS DELIVERED THE OPINION OF THE COURT:

Plaintiff appeals from an order of the Superior Court dismissing his complaint for want of equity after a hearing in open court by the chancellor limited solely to the issues raised by supplemental pleadings, namely, (a) the constitutionality of the fees and charges of the referees under [illegible], and (b) the plaintiff's claim for the allowance of attorneys' fees and expenses.

From the opinion in a prior proceeding between the same parties, which was determined adversely to plaintiff and affirmed by the Supreme Court in [illegible] v. [illegible], 385 Ill. 111, it appeared that on November 1, 1927, [illegible]. However, the owner of the fee-simple title to such [illegible] at the southwest corner of Michigan Avenue and Wait Chicago street in Chicago, executed a lease covering the property to the Studios-Investment Building Corporation for a term of 99 years ending November 14, 2026, at a yearly rental of $[illegible], plus the payment of taxes and an annual fee of $[illegible] to the Chicago Title and Trust Company, which was to become trustee and lessor. The lease provided that the lessee was to maintain and maintain a $1,[illegible],000 depreciation fund in quarter-annual instalments which was to provide for the retirement of land-trust certificates and for depreciation; that the lessee was to demolish the improvements then on the premises and, with the pre-

ceeds of a leasehold bond issue, was to construct a six-story modern building to have a fair value of not less than $850,000. A new building was erected at a cost in excess of $1,000,000, and upon completion thereof it became additional security for the performance of the terms of the lease, which also provided that the lessor was to have a first, superior and paramount lien upon the leasehold estate.

Immediately following the execution of the lease Sawyer conveyed the fee-simple title to the property to Chicago Title and Trust Company as trustee, subject to the lease, and simultaneously executed an agreement and declaration of trust wherein Chicago Title and Trust Company became trustee. The equitable ownership and beneficial interest in the trust estate was divided into 1275 indivisible equal shares, each representing one 1275th part of the equitable ownership of the trust estate. The shares were represented by certificates of equitable ownership, also known as land-trust certificates, transferable upon the bo the trustee. The trust was to continue for the leaseho unless sooner terminated, and by its terms the trust quired to pay to the beneficiaries on the 15th November of each year, the net proceeds whi from the rental of the property. Upon year period the lease was subject t for partition. By means of

Under article V of the t the trustee for all fees collecties of the trustee were restrincluding specifically the fees from the trust estate and the per year and those for extraordiof to the certificate holde and obtaining tax refunds. Their of the trustee for its ord was dismissed for want of equity in per year, and provided th 6, 1943 the Supreme Court affirmed able compensation for ex

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efforts to work out a satisfactory arrangement with the lessee proved unsuccessful. Subsequently a post-war condition, representing the soldiers of 1941 manner, urged the lessee to foreclose its lien for rent instead of forfeiting the lease, because it was feared that the lessee's substitution by forfeiture of the improvements placed upon the property by the lessee, would result in a substantial loss to upon the beneficiaries of the trust. Accordingly foreclosure proceedings were instituted by the trustee, and the leasehold estate was bid in at the foreclosure sale by Stratford-Stockton Company, a corporation wholly controlled by the Stockton title and trust company as trustee, for the use and benefit of the beneficiaries, which acquired title to the leasehold by the issuance of a master's deed in July 1941.

Plaintiff acquired these beneficial rights in December 1940, long after the plan for attaching a portion in income taxes had been conceived but while it was in the process of being carried out. It was in 1942 that Plaintiff and wife filed, owning an aggregate of 20 shares, their first suit against in the Superior Court against the trustee, consisting of two counts, in the first of which they contended that the leasehold estate had become merged with the fee and that accordingly the trust had terminated, and they asked for partition. By means of count 2 they sought to recover from Stratford-Stockton the back rent collected since the date of default, including specifically the item for military service of $[illegible] per month and those for extraordinary services in paying brokerage and soliciting for renewals. Their complaint in that proceeding was dismissed for want of jurisdiction in May 1943, and on November 30, 1943 the Superior Court affirmed the decree.

Under the terms of the trust agreement, the trustee was

authorized to sell the property with the consent of the holders of three-fourths of the outstanding shares of beneficial interest. In November 1944 it received an offer of $600,000 for the property, and the following February 1945 two bids of $700,000 and $720,000, respectively, were received. When the original complaint in these proceedings was filed on March 28, 1945, the trustee was in the process of attempting to obtain sufficient consents from the certificate holders to authorize a sale. The original complaint in this proceeding filed against the trustee and Chestnut-Michigan Company, its subsidiary corporation, sought to bring about a sale of the property either under a decree of court finding that the trust had failed and an order directing the trustee to sell the property under the court's direction and control, or by having the court decree that the bidder, a certificate holder who was withholding his consent and who controlled sufficient certificates to bring the number of consents over the necessary three-fourths, had consented to the sale. Before return day the trustee had received consents to a sale from the requisite number of certificate holders, had conducted an auction at which the property was bid up to $877,000, and had contracted to sell at this price. Defendants' answer to the original complaint, filed April 21, 1945, set forth these facts, and averred that by reason of what had occurred, the cause had become moot and that the court had no further jurisdiction of the subject matter.

April 24, 1925 plaintiff filed a reply to the trustee's answer. He admitted that the case had become moot "as to the sale of the property," but alleged that the court had jurisdiction to determine the fairness and reasonableness of the trustee's fees and expenses of the trustee with respect to its sale of the property for $877,000. A day or two after filing his reply plaintiff filed a supplemental amendment to the complaint wherein he again admitted that the object of the complaint, in so far as it sought

authorized to sell the property with the consent of the holders of three-fourths of the outstanding shares of preferred interest. In November 1944 it received an offer of $100,000 for the property, and the following February $140 bids of $200,000 and $220,000, respectively, were received. When the original complaint in these proceedings was filed on March 13, 1945, the trustee was in the process of attempting to obtain sufficient consents from the certificate holders to authorize a sale. The original complaint in this proceeding filed against the trustee and Chestnut-Hickory Company, its subsidiary corporation, sought to bring about a sale of the property either under a decree of court finding that the trust had failed and an order directing the trustee to sell the property under the court's direction and control, or by having the court decree that the holder, a certificate holder who was withholding his consent and who contended sufficient certificates to bring the number of consents over the necessary three-fourths, had consented to the sale. Before noonday the trustee had received consents to a sale from the requisite number of certificate holders, had concluded an agreement by which the property was bid up to $221,000, and had contracted to sell at this price. Intervenors' answer to the original complaint, filed April 23, 1945, set forth these facts, and averred that by reason of what had occurred, the cause had become moot and that the court had no further jurisdiction of the subject matter.

April 24, 1945 plaintiff filed a reply to the intervenors' answer. He admitted that the case had become moot "as to the sale of the property," but alleged that the court had jurisdiction to determine the fairness and reasonableness of the trustee's fees and expenses of the trustee with respect to its sale of the property for $221,000. A day or two before filing his reply plaintiff filed a supplemental complaint to the complaint wherein he again admitted that the object of the complaint, in so far as it sought

the sale of the premises, was accomplished, but alleged that the trustee intended to make a charge of $21,000 for services in connection with the sale and final distribution, in addition to its fee for ordinary services of $3000 per year, and that these charges were excessive; and he asked that the trustee be directed to file an account, and that the court should thereafter pass upon the fairness and reasonableness of the trustee's fees and expenses. Defendants answered the supplemental amendment by again averring that the cause had become moot, and that the court had no further jurisdiction thereof.

In September 1945 plaintiff filed another supplemental amendment alleging that the trustee had sent out a communication advising that it was proposing to charge fees of $28,815.84, consisting of various items enumerated in the amendment, and alleging that such charges were excessive, and that the court should pass upon their reasonableness and surcharge the trustee with any amount that was found to be excessive. Defendants' answer to the second supplemental amendment denied that the charges were excessive. It should be noted that in two communications to the certificate holders, dated November 20, 1944 and February 2, 1945, the trustee had indicated the fees which it had proposed to charge in case of sale, $21,000 and $28,000, respectively; nevertheless, plaintiff's original complaint contained no allegations questioning the propriety or amount of these proposed fees.

The cause then progressed to hearing, and on October 31, 1945, while the hearing was in progress, plaintiff filed a third amendment asking for the allowance of fees to his attorneys for benefits which he claims to have conferred upon the estate. The trustee answered the third amendment by denying the material allegations thereof.

It thus appears that the sole object of the original

the sale of the premises, was accomplished, he alleged that the trustee intended to make a charge of $[illegible] for services in connection with the sale and final liquidation, in addition to its fee for ordinary services of $[illegible] per year, and that these charges were excessive; and he asked that the trustee be directed to file an account, and that the bailor should thereafter pass upon the fairness and reasonableness of the trustee's fees and expenses. Defendants answered the supplemental amendment by again averring that the estate had become bankrupt, and that the court had no further jurisdiction thereof.

In September 1947 plaintiff filed another supplemental amendment alleging that the trustee had sent out a communication advising that it was proposing to charge fees of $[illegible], consisting of various items enumerated in the letter, and alleging that such charges were excessive, and that the court should pass upon their reasonableness and authorize the trustee with any amount that will found to be reasonable. Defendants' answer to the second supplemental amendment denied that the charges were excessive. It should be noted that in two communications to the certificate holders, dated November 26, 1946 and February 9, 1947, the trustee had indicated the fees which it had proposed to charge in case of sale, $[illegible] and $[illegible], respectively; nevertheless, plaintiff's original complaint contained no allegations questioning the propriety or amount of these proposed fees.

The cause then progressed to hearing, and on October 31, 1947, while the hearing was in progress, defendant filed a third amendment asking for the allowance of fees to its attorneys for benefits which he claims to have conferred upon the estate. The trustee answered the third amendment by denying the material allegations thereof.

It thus appears that the sole object of the original

complaint, namely, to bring about a sale of the property either under a decree of court or by having the court determine that the bidder, a certificate holder who was withholding his consent, had consented to the sale, having admittedly become moot, plaintiff by his supplemental amendments sought to change the nature of the proceeding and for the first time to challenge the trustee's fees and charges and to claim fees for the services of his attorneys.

Out of the proceeds of the sale the trustee made the following charges:

Trustee's fee re sale	$17,540.00
Title guarantee policy charges	571.95
Ordinary trustee's fees from Nov. 15, 1944 to June 30, 1945	1,875.00
Fees for payment of real estate taxes	288.41
Fees re real estate tax refunds	224.82
Fees for closing Trust	1,027.00
Fees for making distribution	7,288.66
Making a total of fees to the Chicago Title and Trust Company in the sum of	$28,815.84

On oral argument plaintiff's counsel stated that he had no objections to the allowance of items 2 and 3, namely, $571.95 for the title guarantee policy, and $1875.00 as fees for the ordinary services rendered by the trustee from November 15, 1944 to June 30, 1945. As to the two principal items the only evidence offered by plaintiff in support of his objection was that of two witnesses, Karl Velde, trust officer of the Chicago Title and Trust Company, who was examined under section 60 of the Civil Practice Act, and Louis T. Kane, trust officer of the La Salle National Bank. An examination of the record discloses that neither of them gave any testimony tending to show that the trustee's fees were excessive.

Preliminary to Mr. Velde's examination by plaintiff's counsel, various exhibits were offered and received in evidence, including the declaration of trust and letters written by the trustee to certificate holders apprising them of their rights

complaint, namely, to bring about a sale of the property either under a decree of court or by having the court determine that the bidder, a certificate holder who had withdrawing his consent, had consented to the sale, having constructively become moot, plaintiff by his supplemental amendment sought to change the nature of the proceeding and for the first time to challenge the trustee's fees and charges and to claim fees for the services of his attorneys.

Out of the proceeds of the sale the trustee made the following charges:

Trustee's fee on sale	$17,[illegible]
Title guarantee policy charges	[illegible]
Ordinary trustee's fees from Dec. 15, 1944 to June 30, 1945	[illegible]
Fees for payment of real estate taxes	[illegible]
Fees to real estate tax delinquent	[illegible]
Fees for closing trust	[illegible]
Fees for making distribution	[illegible]
Making a total of fees to the trustee [illegible] and first mortgagee in the sum of	[illegible]

In oral argument plaintiff's counsel stated that he did not objection to the allowance of fees [illegible], namely, $[illegible] for the title guarantee policy, and $17,[illegible] for the ordinary services rendered by the trustee from December 15, 1944 to June 30, 1945. As to the two principal items the only evidence offered by plaintiff in support of his objection was that of two witnesses, Earl Fields, treasurer of the Chicago Title and Trust Company, who was [illegible] under section 60 of the Civil Practice Act, and Leslie [illegible], Esq., trust officer of the La Salle National Bank. A recapitulation of the general testimony that neither of them gave has [illegible] bearing, to show that the trustee's fees were excessive.

Preliminary to Mr. Fields's examination by plaintiff's counsel, various exhibits, were offered and received in evidence, including the declaration of trust and letters written by the trustee to certificate holders regarding them of their rights

and interest with respect to the proposed sale of the property and indicating the fees which it proposed to charge in the event of a sale, estimates as to brokerage and attorneys' fees, and the approximate amount that would be available for distribution for each $1000 bond.

With respect to the first item of $17,540, being the trustee's fee for sale of the property, Mr. Velde testified that this constituted 2 per cent of the gross sales price, "an established fee which has been in use by the Chicago Title & Trust Co. and by most of the other trust companies for some time." He stated that "it wouldn't make any difference what work was performed as the 2% would be a minimum charge. If the sale price was $800,000, instead of $877,000 the fees would be based on the amount of the sale." He testified that the trustee's services involved negotiating bids through various brokers, many of whom were contacted by the trustee, and that the ordinary fees stipulated in the trust agreement did not include the procuring of a purchaser. He further stated that "I do not know of any other basis that trustees use around Chicago. The Continental Illinois National Bank and Trust Company uses the 2% minimum basis, the City National Bank, the First National Bank of Chicago, Harris Trust and Savings Bank and Northern Trust Co."

As to the second largest item, $7,288.66 for making distribution, Mr. Velde testified that there were approximately 200 unit holders whose names and addresses were registered. Distribution of the proceeds entailed the responsibility for seeing that the money reached the proper persons. "Sometimes people die and we have to determine who are entitled to those interests. * * * We must see that the directions in the trust agreement concerning distribution are followed. * * * There is a great deal of work involved in that kind of distribution. It requires

and interest with respect to the proposed sale of the property and indicating the fact which it proposed to charge in the event of a sale, estimates as to commission and attorneys' fees, and the approximate amount that would be available for distribution for each class thereof.

With respect to the first item of $14,340, being the trustee's fee for sale of the property, Mr. Vilas testified that this constituted 5 per cent of the gross sale price, "as established fee which has been in use for the Chicago Title & Trust Co. and by most of the other trust companies for some time." He stated that it wouldn't make any difference what work was performed as the fee would be a minimum charge. If the sale price was $300,000, instead of $287,800 the fee would be based on the amount of the sale." He testified that the trustee's services involved considerable labor through various brokers, many of whom were contacted by the trustee, and that the ordinary fees stipulated in the trust agreement did not include the procedure of a proceeding. He further stated that it is not true of any other bank that trustees are appointed through the Continental Illinois National Bank and Trust Company with the 3% minimum basis, the City National Bank, the First National Bank of Chicago, Harris Trust and Savings Bank and Northern Trust Co."

As to the second largest item, $7,000.00, for making distribution, Mr. Vilas testified that there were approximately 500 audit holders whose names and addresses were published. Distribution of the proceeds entailed the responsibility for seeing that the money reached the proper persons. " Considering probable and we have to distribute the money equitably to those interested, * * * we must see that the directions in the trust agreement concerning distribution are followed. * * * There is a great deal of work involved in that kind of distribution. It requires

making up a list of certificate holders, computing the amount to determine the proceeds of the sale and the amount of money on hand, the reserve to be held to, contacting various departments to make sure that the bills were paid, and to pro rate the balance among the certificate holders. In many cases there would be a doubt as to who was entitled to payment in case of death. * * * It is not only a responsibility, but there is also a chance of error. * * * Where doubt came up, it was submitted to the trust counsel before final payment and then notice was sent out to the certificate holders. When certificates were received and were in proper order, checks were sent out to certificate holders. We had a registered list in our possession at all times but it was necessary to make a new list in order to bring it up to date. * * * They had to surrender to us the certificates before we turned over the money. * * * Our communication to each certificate holder was to present the certificates and the responsibility was in paying out the money to the registered owner of the certificate and for that kind of service, we are entitled to the charge." In Mr. Velde's opinion all the charges made by the trustee were fair, reasonable and customary in the City of Chicago for services of like kind and nature.

Louis T. Kane, called as a witness for plaintiff, testified that he was an assistant trust officer of the La Salle National Bank, that he had handled a number of liquidation trusts where the property had been sold, and that the bank charged 2 per cent of the sale price, which included services in connection with the sale of the property, liquidation of the trust and distribution to certificate holders, but on cross-examination he stated that his bank ordinarily also made charges for opening and closing a trust account.

On behalf of the trustee Arthur T. Leonard, vice president

making up a list of certificate holders, computing the amount to determine the proceeds of the sale and the amount of money on hand, the reserve to be held to, considering various improvements to make sure that the bills were paid, and so pro rata the balance among the certificate holders. In many cases this would be a doubt as to who was entitled to payment in case of death. * * * It is not only a responsibility, but there is also a chance of error. * * * There could same as, it was submitted to the trust created before that payment and when notice was sent out to the certificate holders. When certificates were received and were in proper order, checks were sent out to certificate holders. We had a registered list in our possession at all times but it was necessary to make a new list in order to bring it up to date. * * * They had to surrender to us the certificates before we turned over the money. * * * Our communication to each certificate holder was to present the certificate and the responsibility was in paying out the money to the original owner of the certificate and for that kind of service, we are entitled to the charge." Mr. Mr. Valde's opinion all the charges made by the trustee were fair, reasonable and customary in the city of Chicago for services of like kind and nature.

Louis L. Rand, called as a witness for plaintiff, testified that he was an assistant trust officer of the Illinois National Bank, that he has handled a number of liquidation trusts where the property had been sold, and that the bank charges a per cent of the sale price, which includes services in connection with the sale of the property, liquidation of the trust and distribution to certificate holders, but on cross-examination he stated that his bank ordinarily also made charges for opening and closing a trust account.

On behalf of the trustee Arthur E. Hammond, vice president

in charge of the trust department at the City National Bank and Trust Company, testified that he was familiar with land trusts, "which are not ordinary trusts and are rather rare in this community," as well as with the usual and customary charges made by trustees in liquidation trusts. He stated that in his opinion the usual customary charge for the sale of real estate by trustees is 2 per cent of the proceeds where a broker is involved; that there is customarily a termination charge made by trustees and one for distribution of the net proceeds of the sale, which he fixed at 1 per cent of the sale price. As to the remaining items of $288.41 and $224.82, being fees for payment of real estate taxes and for tax refunds, respectively, Mr. Leonard stated that such charges are customary and usually relatively nominal, as they were in this case.

The chancellor who heard the testimony in open court found that the trustee's fees were not unreasonable or excessive. This finding should not be disturbed on appeal unless it can be said to be clearly against the manifest weight of the evidence. Sueske v. Schofield, 376 Ill. 431; Pure Oil Co. v. Byrnes, 388 Ill. 26; Sroczynski v. Schultz, 381 Ill. 86; Cravens v. Hubble, 375 Ill. 51. The record amply supports the chancellor's findings. On oral argument plaintiff's counsel argued that the trustee received bids for the sale of the property from brokers and did nothing itself, and consequently there was no justification for its charges on a percentage basis. The trust agreement provided that the trustee should be entitled to additional reasonable compensation for extraordinary services. Article IV of the agreement provided for the deduction from the sale proceeds of reasonable compensation to the trustee for its services in connection with the completion of the sale and the distribution of the net proceeds thereof. The Chicago Title and

in charge of the Court Department at the City National Bank and Trust Company, testified that he was familiar with land trusts, "which are not within my trusts and are rather rare in this community," as well as with the usual and customary charges made by trustees in liquidating trusts. He stated that in his opinion the usual customary charge for the sale of real estate by trustees is 2 per cent of the proceeds where a broker is involved; that there is customarily a transaction charge made by trustees and one for distribution of the net proceeds of the sale, which he fixed at 1 per cent of the sale price. As to the remaining items of $[illegible] and $[illegible], being fees for payment of real estate taxes and for tax returns, respectively, Mr. Leonard stated that such charges are customary and usually relatively nominal, in fact even in this case.

The chancellor who heard the testimony in open court found that the trustees fees were not unreasonable or excessive. This finding should not be disturbed on appeal unless it can be said to be clearly against the manifest weight of the evidence. Fiske v. [illegible], 324 Ill. 119; [illegible] v. [illegible], 324 Ill. 63; [illegible] v. [illegible], 271 Ill. 107; [illegible] v. [illegible], 277 Ill. 31. The record shows, moreover, no misfeasance therein. On oral argument, [illegible] contended that the trustee received $[illegible] for the 1.1 of an [illegible] and did nothing itself. No comparable fee was charged [illegible] for its services on a percentage basis. The trust agreement provided that the trustee should be entitled to additional reasonable compensation for extraordinary services. Article 10 of the agreement provided for the distribution from the sale proceeds of reasonable compensation to the trustee for its services in connection with the conveyance of the sale and the distribution of the net proceeds thereof. The Illinois Title and

Trust Company is a large corporation with various departments, the facilities of all of which are used in the administration of hundreds of trusts, and it would obviously be a physical impossibility to produce evidence as to the exact time spent and work performed by each and every officer and employee of the company in the administration of a particular trust. Authorities specifically recognize the established practice of computing trustees' fees on a percentage basis. Bogert, Trusts and Trustees, vol. 4, sec. 976, p. 2864; Restatement of the Law of Trusts, vol. 1, sec. 242; Estate of Peabody, 218 Wis. 541, 260 N.W. 444. Real estate brokers, architects and often lawyers charge for their services on a commission basis. In the case of corporate trustees it would be extremely difficult to fairly evaluate their services in any other manner.

With respect to plaintiff's claim that he ought to be compensated for the services rendered by his attorney, it appears that upon the hearing of this cause, his counsel testified that he was "entitled to compensation for the work based on the proof and testimony brought before the court on objections to fees charged by the trustee herein, if I get the fees reduced. I am basing it as purely contingent." In view of the chancellor's finding that the trustee's fees were not unreasonable or excessive, and our conclusion that the record amply supports this finding, plaintiff on his own theory, would not be entitled to any fees. It developed on oral argument, however, that plaintiff also predicated his claim for fees on the contention that he brought about the sale of the trust property by filing his original complaint and thus forcing the recalcitrant certificate holder to consent to the sale. The law is well settled that attorney's fees cannot be allowed to a trust beneficiary in the absence of express agreement unless he has maintained a successful suit for the preservation, protection

Trust Company is a large corporation with various departments, the facilities of all of which are used in the administration of hundreds of trusts, and it would obviously be a physical impossibility to produce evidence as to the exact time spent and work performed by each and every officer and employee of the company in the administration of a particular trust. Authorities specifically recognize the established practice of compensating trustees' fees on a percentage basis. Bogert, Trusts and Trustees, vol. 4, sec. 976, p. 404; Restatement of the Law of Trusts, vol. 1, sec. 242; Bogert of Trustees, 2d ed., pp. 444. Real estate brokers, accountants and other lawyers charge for their services on a commission basis. In the case of corporate trustees it would be exceedingly difficult to fairly compute their services in any other manner.

With respect to plaintiff's claim that he ought to be compensated for the services rendered by his attorney, in equity for upon the handling of this trust, his counsel contended that he was entitled to compensation for the work done in the probate and testamentary courts before the court on objections to final account by the trustee herein, if I get the law correct. I am willing to as purely contingent." In view of the chancellor's finding that the trustee's fees were not unreasonable or excessive, and our conclusion that the record amply supports this finding, disclosed on his own theory, would not be entitled to any fees. In argument on oral argument, however, that plaintiff also contended his claim for fees on the contention that he brought about the sale of the trust property by filing his original complaint and thus causing the receivership authorities below to consent to the sale. The law is well settled that attorney's fees cannot be allowed to a trust beneficiary in the absence of express agreement unless he has maintained a successful suit for the preservation, protection

or increase of a common fund or property, or has created at his own expense and brought into court a fund in which others may share with him. Royal Neighbors v. Chicago Title and Trust Company, 297 Ill. App. 80. The conclusion that plaintiff was in any way instrumental in bringing about the sale is not sustained by the record. He procured no additional consents nor any new bidders for the property. The record shows that shortly after the filing of his original complaint, namely, by April 10, 1945, consents to a sale had been filed with the trustee on 959 shares, or more than three-fourths of the total number of shares outstanding. With respect to the unsuccessful bidder, the certificate owner who up to the time that plaintiff's complaint was filed, had not consented to a sale, there is no evidence that he was induced thereafter to file such consent because of the suit instituted by plaintiff.

The case was fairly tried, and we find no convincing reason for reversal. The decree should therefore be affirmed, and it is so ordered.

DECREE AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

or interest of a person that is property, or has contract in his own purpose and property into which it had to which others may have with him. Pacific Telephone v. Superior Court in and County, 297 Ill. App. 70. The conclusion that plaintiff was in any way instrumental in bringing about the sale is not warranted by the record. He produced no additional customers nor any new listings for the property. The record shows that shortly after the filing of his original complaint, namely, by April 10, 1944, somewhere in a sale had been made with the trustee on 9th Street, or more than three-fourths of the total number of lots available. With respect to the unsuccessful bidder, the certificate holder who up to the time that plaintiff's complaint was filed, had not complied in all, there is no evidence that he was induced thereunto by the such somewhat because of the suit initiated by plaintiff.

The case not fairly tried, and we find no sufficient reason for reversal. The decree should therefore be affirmed, and it is so ordered.

PRESIDING JUSTICE,

Sullivan, P. J., and Scanlan, J., concur.

43730

138 A

AYRES BOAL, Appellant,	)	
v.	)	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.
CITY OF CHICAGO et al., Appellees.	)	

330 I.A. 614

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment order striking his complaint as amended and dismissing the cause at plaintiff's costs.

This order was entered upon a verified motion of defendants to strike the complaint and dismiss the cause upon the ground, inter alia, that the alleged cause of action as set forth in the three counts of the complaint as amended did not accrue to plaintiff within the time limited by law for the commencement of the action. Plaintiff contends that his action is one to enforce a trust, and that the statute of limitations is not a good defense to such action.

The material facts, briefly stated, are as follows: On August 16, 1927, in a proceeding under the Local Improvement Act, plaintiff recovered two judgments against the City of Chicago in the respective amounts of $55,000 and $48,714. On September 28, 1927, the City paid to plaintiff said amounts by a warrant, or voucher, in the sum of $103,714, that contains the following language: "being in full payment for said condemned land [which is described in the warrant] and in full of all claims for damages to same by reason of said proceedings." The instant proceeding was not commenced until January 16, 1934. The complaint alleges that interest in the sum of $700 upon the judgments remained unpaid; that demands for the payment of said interest were made upon the City and payment was refused, and plaintiff sues to recover said $700 and in addition thereto interest thereon.

41720

AMOS MOAT,

Appellant,

v.

CITY OF CHICAGO et al.,

Appellees.

Appeal from circuit court of Cook county.

Mr. JUSTICE SCALES DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment order sustaining his complaint as amended and dismissing the cause at plaintiff's costs.

This order was entered upon a verbal motion of defendants to strike the complaint and dismiss the cause upon the ground, inter alia, that the alleged cause of action as set forth in the three counts of the complaint as amended did not accrue to plaintiff within the time limited by law for the commencement of the action. Plaintiff contends that his action is one to enforce a trust, and that the statute of limitations is not a good defense to such action.

The material facts, briefly stated, are as follows: On August 16, 1927, in a proceeding among the local improvement act, plaintiff recovered two judgments against the City of Chicago in the respective amounts of $[illegible] and $[illegible]. On September 28, 1927, the City paid to plaintiff said amounts by a warrant, or voucher, in the sum of $[illegible], that contains the following language: "Paid in full payment for said condemned land [which is described in the warrant] and in full of all claims for damages to same by reason of said proceedings." The instant proceeding was not commenced until January 16, 1934. The complaint alleges that interest in the sum of $700 upon the judgments remained unpaid; that demands for the payment of said interest were made upon the City and payment was refused, and plaintiff sues to recover said $700 and in addition thereto interest thereon.

In Guaranty Mtg. & Security Co. v. City of Chicago, 328 Ill. App. 276 (App. Den. 393 Ill. 629), the opinion states (p. 282): "The acceptance and indorsements of the checks, and the signing of receipts indorsed on the vouchers, are not denied. The effect of such action by the plaintiffs has been held to amount to an acceptance of the money received in full payment of the compensation awarded in the condemnation proceeding, leaving the question of interest on the judgment, which is created by the statute and is not a part of the judgment, undisposed of. Cohen v. City of Chicago, 377 Ill. 221, 235-236; Chapralis v. City of Chicago, 326 Ill. App. 554; Trust Co. of Chicago v. City of Chicago, 327 Ill. App. 222. * * *

"The principal of the judgment having been satisfied, nothing remained except plaintiffs' claim for accrued interest, action for which should have been instituted within 5 years from the final payment of the compensation award. Blakeslee's Storage Warehouses v. City of Chicago, 369 Ill. 480. Plaintiffs failed to bring action within that time."

But plaintiff contends that the statute of limitations does not apply to his claim because under Section 42a of the Local Improvement Act (ch. 24, par. 84, Ill. Rev. Stat. 1945), a direct trust is established for the benefit of the landowner whose property is taken for the improvement; that the instant case is based upon that section and that the point now raised by plaintiff has not been passed upon by the appellate courts nor the Supreme court. Counsel for plaintiff state that in Trust Co. of Chicago v. City of Chicago, 327 Ill. App. 222, Section 42a "was referred to by counsel merely in argumento," but they contend that it was not involved in that case and "was not relied upon by the appellant company." We have before us the briefs that were filed in that case, and while it is true

In Guernsey Bd. v. Commrs. v. City of Chicago, 347 Ill. App. 374 (Ill. App. Ct., 1st Dist., 1952), the opinion states (p. 382): "The acceptance and interpretation of the ordinance, and the signing of receipts indorsed on the warrants, are not denied. The effect of such action by the plaintiffs has been held to amount to an acceptance of the money mentioned in full payment of the compensation awarded in the condemnation proceeding, leaving the question of interest in the judgment, which is created by the statute and is not a part of the judgment, undisposed of." Cohen v. City of Chicago, 347 Ill. App. 387-390; Chapin Ile v. City of Chicago, 348 Ill. App. 394; Chicago Co. of Illinois v. City of Chicago, 347 Ill. App. [illegible]

"The principal of the judgment having been satisfied, nothing remained except plaintiffs' claim for accrued interest, which for which should have been instituted within 7 years from the final payment of the compensation award. Chicago Title Storage Trust Co. v. City of Chicago, [illegible] Ill. [illegible]. Plaintiffs failed to bring action within that time."

But plaintiff contends that the statute of limitations does not apply to his claim because Section [illegible] of the Local Improvement Act (Ch. 24, par. 34, Ill. Rev. Stat. 1957), a direct trust is established for the benefit of the landowner whose property is taken for the improvement and the instant case is based upon that section and that the judgment rendered by plaintiff has not been passed upon by the municipal courts nor the supreme court. Counsel for plaintiff cites that in Trust Co. of Chicago v. City of Chicago, 347 Ill. App. 407, Section 42a "was referred to by counsel merely in passing," but they contend that it was not involved in that case and "was not relied upon by the appellant company." We have perused as the briefs that were filed in that case, and while it is true

that in the plaintiffs' brief they did not, apparently, rely upon Section 42a, we find that they were allowed to file, upon their request, "Supplemental Citations and Suggestions," which is a brief of thirty-six printed pages, and we find therein (pp. 17, 18) that the plaintiffs cite Section 42a and contend that it establishes a "special trust fund applicable primarily to pay interest upon the condemnation awards which are charged specially by the statute upon the first installment," when not promptly paid. "Thereby the interest which accrues on first installment of special assessment is a permanent tax lien until paid, free from any and all statutes of limitation." The argument made by the City in that case was practically the same as its argument upon the instant point in the case now before us. In Trust Co. of Chicago v. City of Chicago the opinion states: "Under plaintiffs' theory a trust relationship existed between the parties, and the City of Chicago was therefore precluded from interposing the bar of the five-year statute of limitations," and it was held, properly, we think, that "plaintiffs' theory of a trust as set forth in their briefs is without merit." The Supreme court denied an appeal in that case. (391 Ill. 629.) In the instant case defendants contend that plaintiff is neither a holder of bonds issued in anticipation of collections of special assessments nor an assessee who claims a surplus in certain funds over and above the cost of completing local improvements; that no case can be found in this State holding that the municipality stands in a trust relationship to a judgment creditor, who is not limited to any particular fund nor limited to a distributive share in any fund; that the judgment in the instant case, if the claim is not barred by the statute, is an absolute liability of the municipality payable in full and at all events; that the City's resistance to plaintiff's claims is not on the basis that there is not sufficient

that in the plaintiffs' brief they did not, incidentally, rely upon Section 40, we find only they were allowed to file, upon such request, "supplemental briefs and memorandums," which is a total of eighty-six printed pages, and we find therein (pp. 17, 18) that the plaintiffs cite Section 40a and contend that it establishes a "special trust fund applicable primarily to pay interest from the condemnation awards which are charged personally by the cities upon the first installment," when not promptly paid. Thereby the interest which accrues on first installment of special assessment is a permanent tax lien until paid, free from any and all statutes of limitation." The argument made by the City in that case was practically the same as its argument upon the instant point in the case now before us. In [illegible] of [illegible], [illegible] of Chicago the opinion states: "There plaintiffs' theory is that relationship exists between the parties, and the City of Chicago was therefore precluded from interposing as to any of the five-year statutes of limitations," and it was held, perforce, we think, that "plaintiffs' theory was a good, if not novel, one in their behalf in without merit." The argument must similarly be upheld in that case. (Vol III, 629.) In the instant case defendants contend that plaintiff is seeking a judgment of such issued in contemplation of collections of special assessments for an assessment the claims a surplus in certain funds over and above the cost of completing local improvements, that no such can be found in the state to justify that the municipality should in a proper litigation say to a judgment creditor, who is not limited to any particular fund nor limited to a liability arising in any fund, that the judgment in the instant case, if the claim is not barred by the statute, is an absolute liability of the municipality payable in full and at all events, that the City's remedy to plaintiff's claims is not on the basis that there is not sufficient

money in some fund with which to pay the claim for which reason the claim falls; that the defense is that the claim for interest is barred by the statute of limitations; that if it is not barred the full taxing power of the City could be called upon to accomplish payment of the claim. Plaintiff has been allowed, because of the illness of his principal counsel, many extra months in which to file his reply brief, but in the reply brief finally filed counsel have not referred us to a single Illinois case that sustains plaintiff's position. Counsel state that "the trust relationship relied upon by plaintiff is not implied in law but is expressly created by Section 42a of the Local Improvement Act," and Flanagan v. City of Chicago, 311 Ill. App. 135, and Site of Ft. Dearborn Building Corp. v. City of Chicago, 318 Ill. App. 139, 144, are cited in support of this position. The Flanagan case, decided by this Division of the court, involved a surplus in the hands of the City of special assessments collected over and above the completion of the project, and we held that such surplus constituted a trust fund of which the assessees were the beneficiaries and the City the trustee. The Site of Ft. Dearborn Building Corp. case involved special assessment rebates and the court held that the fund involved was a trust fund and that the statute did not commence to run until the plaintiff had notice of the City's violation of the trust.

[2,3] In Blakeslee's Warehouses v. City of Chicago, 369 Ill. 480, it was held (pp. 483, 484) that "The recovery of interest in this State, not contracted for, finds its only authority in the statute. [Citing cases.] * * * if appellant is entitled to interest on the judgment it is not by virtue of the judgment or the judicial proceeding culminating therein, but arises solely under the provisions of the statute. Turk v. City of Chicago, supra [352 Ill. 171.] * * * The action in this case is not upon the judgment. It has been paid. The claim is for interest which

money in some fund with which to pay for claims for which reason the claim fails; that the interest in that the claim for interest is barred by the statute of limitations that if it is not barred the full taking power of the City would be called upon to consummate payment of the claims. Liability has been denied, because of the failure of the principal counsel, may rather, acting in which to file the reply brief, but in the opinion, which finally filed counsel have not referred us to a single Illinois case that sustains plaintiff's position. Counsel state that the usual relationship relied upon by plaintiff is not limited to law but is expressly stated by statute as of the local Improvement act," and Jameson v. City of Chicago, 21 Ill. App. 515, and City of Ft. Lauderdale Building Corp. v. City of Chicago, 347 Ill. App. 137, 144, are cited in support of this position. The Jameson case, decided by this district of the court, involved a surplus in the funds of the City of special improvement bonds issued over and above the construction of the project, and we held that such surplus constituted a trust fund or which the assessees are the beneficiaries and the City the trustee. The City of Ft. Lauderdale Building Corp. case involved special assessment rebates and the court held that the rule involved was a trust fund and that the statute did not prohibit so the small the plaintiff had notice of the rights existing of the trust.

In Kimbrough v. City of Chicago, 347 Ill. 440, it was held (p. 444, 445) that the property of interest in this state, not contemplated for, that is the only authority in the statute. [Citing cases.] * * * If question is solely to interest on the judgment it is not by virtue of the judgment or the judicial proceeding enforcing the claim, but arises solely under the provisions of the statute. Tuttle v. City of Chicago, supra [352 Ill. 172.] * * * The action in this case is not upon the judgment. It has been paid. The claim is for interest which

is solely of statutory origin." (Italics ours.) The court further held that the interest on the judgment cannot be considered a part of the value of the land taken, for which the judgment was entered, and that the action was barred because it was not commenced within five years next after the cause of action accrued.

Plaintiff calls our attention to Village of Bradley v. N. Y. C. R. R. Co., 277 Ill. 608, where Section 42a of the Local Improvement Act was involved. There the court said (pp. 613, 614):

"The next objection refers to the division of the assessment into installments, which is said not to comply with the statute because the ordinance does not provide that so much of the aggregate amount assessed as represents the compensation for property to be taken or damaged, together with the cost of making and collecting the assessment, should be apportioned to the first installment, as required by section 42a of the Local Improvement act. The ordinance provided that the assessment should be divided into ten installments bearing five per cent interest per annum, and should be 'collectible all in the manner provided in and by said act of the General Assembly of the State of Illinois entitled "An act concerning local improvements," approved June 14, A. D. 1897, in force July 1, A. D. 1897, and subsequent amendments thereto.' The commissioners, in making the assessment, divided it into ten installments, the first being $21,011.66 and the other nine $18,300 each. The amount of the estimate was $183,500. The compensation for property taken was assessed at $2211.66 and the cost of making and collecting the assessment at $10,703, making a total of $12,914.66, which should have been added to the first installment under section 42a of the statute. This would make that installment $30,911.66 and each subsequent

is solely of statutory origin." (Italics ours.) The court further held that the interest on the judgment cannot be considered a part of the value of the land taken, for which the judgment was entered, and that the action was barred because it was not commenced within five years next after the cause of action accrued.

Plaintiff calls our attention to Alderman of Spaulding v. M. Y. C. R. R. Co., 77 Ill. 603, where Section 46a of the Local Improvement Act was involved. There the court said (pp. 613, 614):

"The next objection relies on the division of the assessment into installments, which is said not to comply with the statute because the ordinance does not provide that so much of the aggregate amount assessed as represents the compensation for property to be taken or damaged, together with the cost of making and collecting the assessment, should be apportioned to the first installment, as required by section 46a of the Local Improvement act. The ordinance provides that the assessment should be divided into ten installments bearing five per cent interest per annum, and should be 'collectible all in the manner provided in and by sections of the General Assembly of the State of Illinois entitled 'An act concerning local improvements,' approved June 14, A. D. 1872, in force July 1, A. D. 1872, and subsequent amendatory thereto.' The commissioners, in making the assessment, divided it into ten installments, the first being $2,[illegible].65 and the other nine $18,300 each. The amount of the entirety was $[illegible]. The compensation for property taken was assessed at $[illegible].65 and the cost of making and collecting the assessment at $[illegible], making a total of $[illegible], which should have been added to the first installment under section 46a of the statute. This would make that installment $[illegible].65 and each subsequent

installment $17,200. The commissioners therefore did not divide the assessment into installments in accordance with section 42a of the Local Improvement act as amended in 1915, as they should have done under the ordinance."

Defendants concede the correctness of the ruling in that case and cite to the same effect Rothschild v. Village of Calumet Park, 350 Ill. 330; People v. Village of Bradley, 367 Ill. 301, and Friedman v. City of Chicago, 374 Ill. 545. They further concede that under the Local Improvement Act the municipality is a trustee for the benefit of the assessees and is compelled to distribute any surplus of special assessments collected. (See Flanagan v. City of Chicago, supra (311 Ill. App. 135. App. Den. 311 Ill. xv), where a representative suit was brought on behalf of all property owners assessed for the cost of a local improvement and a surplus remained in the hands of the City after payment of the cost of completion. We conclude that the contention of plaintiff that Section 42a establishes a direct trust for the benefit of plaintiff in the instant proceeding is without the slightest merit; that no trust relationship exists between the City and plaintiff, and therefore the statute of limitations applies to the instant claim.

Defendants contend that "the trust relationships which do arise under the Local Improvement Act are implied in law and claimants to the trust fund are subject to the statute of limitations," but we do not deem it necessary to pass upon this contention.

We find no merit in plaintiff's contention that his counter-affidavit filed in opposition to defendants' motion to dismiss the suit overcame defendants' affidavit and showed the necessity of discovery and accounting in equity. The counter-affidavit fails to overcome the controlling facts that the payment by the City was in full of the principal of the judgment

installment (17,000). The municipalities boundaries did not divide the assessment into installments in accordance with benefits to the local improvement and so included in Lot, as they should have done under the ordinance.'

Defendants concede the correctness of his ruling in such cases and cite to the same effect particularly, Village of Lincoln Park, 340 Ill. 1(1); People v. Village of Dundee, 347 Ill. 1(1); and Fridgen v. City of Chicago, 334 Ill. 1(1). They further contend that under the local improvement act the municipality is a trustee for the benefit of the assessees and is obligated to distribute any surplus of special assessments collected. (See Fleming v. City of Chicago, 322 Ill. 1(1), 1(1). 1(1), 1(1). 1(1) Ill. 1(1)), where a representative suit was brought on behalf of all property owners assessed for the cost of a local improvement and a surplus resulted in the hands of the city after payment of the cost of acquisition. In sustaining the contention of plaintiff that Section 1(1) authorizes a direct suit for the benefit of plaintiff in the instant proceeding, without the different merits, that no trust relationship exists between the city and citizens, the decisions are notable of limitations applied to the instant suits.

Defendants contend that the trial plaintiff's motion to dismiss under the local improvement act and implied in her amendments to the trial court not subject to the statute of limitations,' but we do not find it necessary to base upon this contention.

We find no merit in plaintiff's contention that his counter-affidavit filed in opposition to defendants' motion to dismiss the suit overcome defendants' affidavit and showed the necessity of discovery and accounting in equity. The counter-affidavit fails to overcome the controlling fact that the payment by the city was in full of the principal of the judgment

and that the statute of limitations has run.

In our judgment the new point raised by plaintiff's astute attorneys is but an effort to revitalize a dead claim.

This appeal is without merit and the judgment order of the Circuit court of Cook county should be and it is affirmed.

JUDGMENT ORDER AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

and that the statute of limitations has run.

In our judgment the per point raised by plaintiff's astute attorney is but an effort to revitalize a dead claim.

This appeal is without merit and the judgment order of the Circuit court of Cook county should be and it is affirmed.

JUDGMENT ORDER AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

43760

MERLE OLIVER,
Appellant,

v.

LINCO PRODUCTS, INC., et al.,
Appellees.

) APPEAL FROM CIRCUIT
) COURT OF COOK COUNTY.

330 I.A. 615

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued Linco Products, Inc., W. J. O'Neil, Albert J. Lengzel and Suburban Transit System, Inc., for injuries sustained in an accident which occurred on December 8, 1942. O'Neil and Lengzel were not served and the cause proceeded to trial before the court and a jury as to defendants Linco Products, Inc., and Suburban Transit System, Inc., hereinafter referred to as the defendants. Each of the defendants filed a motion for a directed verdict. The court reserved its ruling on said motions and allowed the case to go to the jury, which returned two verdicts, one finding Linco Products, Inc., guilty and assessing plaintiff's damages at the sum of $1,000, and a similar verdict against defendant Suburban Transit System, Inc. Each defendant filed a motion for a new trial and also a motion for judgment notwithstanding the verdict. The trial court sustained the motion of each defendant for judgment notwithstanding the verdict and entered a judgment non obstante veredicto as to each defendant.

Plaintiff filed a notice of appeal in which he prayed that the said judgments be reversed and set aside "and that judgments be entered herein on the verdicts of the jury herein in favor of the Plaintiff-Appellant." While his praecipe for record did not include a report of proceedings at the trial, on March 22, 1946, plaintiff's counsel presented to the trial court what purported to be a stenographic transcript of the proceedings. As counsel for the defendants insisted that the alleged report contained

41760

TERRE OLIVER, Appellant,	)	APPEAL FROM CIRCUIT
v.	)	COURT OF DOUGLAS COUNTY.
LINCO PRODUCTS, INC., et al., Appellees.	)	

EN. JUSTICE SCHAEFER DELIVERED THE OPINION OF THE COURT.

Plaintiff and Linco Products, Inc., W. J. O'Neil, Albert J. Longwell and Suburban Transit System, Inc., for injuries sustained in an accident which occurred on December 6, 1942. O'Neil and Longwell were not served and the cause proceeded to trial before the court and a jury as to defendants Linco Products, Inc., and Suburban Transit System, Inc., hereinafter referred to as the defendants. Each of the defendants filed a motion for a directed verdict. The court reserved its ruling on said motions and allowed the case to go to the jury, which returned two verdicts, one finding Linco Products, Inc., guilty and assessing plaintiff's damages at the sum of $[illegible], and a similar verdict against defendant Suburban Transit System, Inc. Each defendant filed a motion for a new trial and also a motion for judgment notwithstanding the verdict. The trial court sustained the motion of each defendant for judgment notwithstanding the verdict and entered a judgment nunc pro tunc verdicto as to each defendant.

Plaintiff filed a notice of appeal in which he prayed that the said judgments be reversed and set aside "and that judgments be entered herein on the verdicts of the jury herein in favor of the plaintiff-appellant." While his praecipe for record did not include a report of proceedings at the trial, on March 24, 1946, plaintiff's counsel presented to the trial court what purported to be a stenographic transcript of the proceedings. As counsel for the defendants insisted that the alleged report contained

approximately a hundred errors, "consisting of typographical errors; errors in the taking of evidence and omission of testimony of witnesses. * * * and other statements appeared in the Record which were not made at the time of trial," the trial court marked the said report "Presented." Plaintiff filed a short record in this court, on April 18, 1946, and on the same date made a motion, supported by an affidavit, asking for an additional sixty days' time within which to file a report of proceedings at the trial. Over the objections of defendants we allowed plaintiff twenty days' additional time in which to file his report of proceedings. Thereafter, on May 1, 1946, plaintiff appeared before the trial judge and presented what purported to be a report of proceedings, and on May 3, 1946, the trial court refused to sign the said report upon the ground that it did not properly present the proceedings that had taken place at the trial of the cause. On May 9, 1946, counsel for plaintiff appeared before Judge Harrington and "then and there moved, the court for leave to file the election of the plaintiff not to include any proceedings at the trial in the record on review and to transmit the record on appeal to the reviewing court without such proceedings," which motion was allowed, and the election was filed.

Plaintiff contends: "It is the plaintiff's theory of the case that the orders of judgments notwithstanding the verdicts of the jury of October 23, 1945, were void, of no effect whatsoever and a nullity, because they were entered in arbitrary violation of Rule 22 of the Rules of the Supreme Court of Illinois, which is a mandatory rule that the defendants waived their motion for a new trial, one of which was not entered in the alternative and that there only remains the verdicts of the juries in the cause, that judgments on the verdicts should either be entered in this Court or the cause reviewed [reversed] with

approximately a hundred errors, "consisting of typographical errors; errors in the taking of evidence and omission of testimony of witnesses, * * * and other statements appeared in the Record which were not made at the time of trial," the trial court marked the said report "Presented." Plaintiff filed a short record in this court, on April 12, 1946, and on the same date made a motion, supported by an affidavit, asking for an additional sixty days' time within which to file a report of proceedings at the trial. Over the objections of defendants we allowed plaintiff twenty days' additional time in which to file his report of proceedings. Thereafter, on May 1, 1946, plaintiff appeared before the trial judge and presented what purported to be a report of proceedings, and on May 3, 1946, the trial court refused to sign the said report upon the ground that it did not properly present the proceedings that had taken place at the trial of the cause. On May 9, 1946, counsel for plaintiff appeared before Judge Harrington and "then and there moved, the court for leave to file the election of the plaintiff not to include any proceedings at the trial in the record on review and to transmit the record on appeal to the reviewing court without such proceedings," which motion was allowed, and the election was filed.

Plaintiff contends: "It is the plaintiff's theory of the case that the orders of judgments notwithstanding the verdicts of the jury of October 23, 1945, were void, of no effect whatsoever and a nullity, because they were entered in arbitrary violation of Rule 22 of the Rules of the Supreme Court of Illinois, which is a mandatory rule that the defendants waived their motion for a new trial, one of which was not entered in the alternative and that there only remains the verdicts of the juries in the cause, that judgments on the verdicts should either be entered in this Court or the cause reviewed [reversed] with

directions to the Lower Court to enter judgments in the verdicts. Rule 22 of the Rules of the Supreme Court of Illinois requires an indication or decision on the motions for a new trial filed and pending before the trial judge to be made in the same order and at the same time as the judgments notwithstanding the verdicts."

Rule 22 provides:

"The power of the court to enter judgment notwithstanding the verdict may be exercised in all cases where, under the evidence in the case, it would have been the duty of the court to direct a verdict without submitting the case to the jury.

"Where the court orders judgment notwithstanding a verdict, in favor of a party entitled to recover damages, the court shall, unless jury be waived, submit to the jury the question of assessing damages.

"In all cases in which the Appellate or Supreme Court orders or enters judgment notwithstanding the verdict, a remandment may be ordered solely for the purpose of assessing damages.

"When a motion for a judgment notwithstanding the verdict shall be filed and submitted in any court of record in any civil cause tried before a jury, and such court shall enter an order granting such motion for judgment notwithstanding the verdict, such court shall at the same time pass upon and decide in the same order any motion for a new trial made by the party moving for judgment notwithstanding the verdict; but such ruling upon said motion for a new trial shall not become effective unless and until the order granting the motion for judgment notwithstanding the verdict shall thereafter be reversed, vacated or set aside in the manner provided by law. An appeal to a court of appellate jurisdiction from a judgment granted on a motion for judgment notwithstanding the verdict, shall, of itself, without the necessity of a cross appeal, bring up for review the

directions to the lower court to enter judgments in the verdicts. Rule 22 of the Rules of the Supreme Court of Illinois requires an indication or decision on the motions for a new trial filed and pending before the trial judge to be made in the same order and at the same time as the judgments notwithstanding the verdicts."

Rule 22 provides:

"The power of the court to enter judgment notwithstanding the verdict may be exercised in all cases where, under the evidence in the case, it would have been the duty of the court to direct a verdict without submitting the case to the jury.

"Where the court enters judgment notwithstanding a verdict, in favor of a party entitled to recover damages, the court shall, unless jury be waived, submit to the jury the question of assessing damages.

"In all cases in which the Appellate or Supreme Court orders or enters judgment notwithstanding the verdict, a remandment may be ordered solely for the purpose of assessing damages.

"When a motion for a judgment notwithstanding the verdict shall be filed and submitted in any court of record in any civil cause tried before a jury, and such court shall enter an order granting such motion for judgment notwithstanding the verdict, such court shall at the same time pass upon and decide in the same order any motion for a new trial made by the party moving for judgment notwithstanding the verdict; but such ruling upon said motion for a new trial shall not become effective unless and until the order granting the motion for judgment notwithstanding the verdict shall thereafter be reversed, vacated or set aside in the manner provided by law. An appeal to a court of appellate jurisdiction from a judgment granted on a motion for judgment notwithstanding the verdict, shall, of itself, without the necessity of a cross appeal, bring up for review the

ruling of the trial court on such motion for a new trial; and the reviewing court shall, if it reverses the judgment entered notwithstanding the verdict, review and determine the validity of the ruling on the motion for a new trial; provided the party whose verdict has been set aside upon motion for judgment notwithstanding the verdict may thereafter make a motion for a new trial, which, if not granted, shall in like manner be acted upon by the reviewing court. Any party who fails to file a motion for a new trial as herein provided shall be deemed to have waived the right to apply for a new trial."

[1,2] Counsel for plaintiff insists that the failure of the trial court to pass upon the motions for a new trial in the judgment order was not only a violation of Rule 22 but that it was highly prejudicial to the rights of plaintiff because it "forced a piecemeal trial of the case." The provision in Rule 22, upon which plaintiff relies, was intended to aid the party who secured the verdict of the jury, in case of appeal. The record shows that counsel for plaintiff was present at the time the judgment was entered and he owed not only a duty to the trial court but a duty to his client to call the court's attention to the pending motions for a new trial. There is nothing in the record to show that he called the court's attention to the pending motions or to the provision of Rule 22. He now seeks to evade the effect of his nonaction at the time of the entry of the judgments by claiming that the trial judge deliberately ignored the provisions of Rule 22 at the insistence of defendants and that the court, "disregarding the plain mandate of Rule 22 of our Supreme court, the Trial Judge forced a piecemeal trial of the case," "thereby putting this plaintiff appellant to the burden of a double appeal and trial of his cause, with all

ruling of the trial court on such motion for a new trial; and the reviewing court shall, if it reverses the judgment entered notwithstanding the verdict, review and determine the validity of the ruling on the motion for a new trial; provided the party whose verdict has been set aside upon motion for judgment notwithstanding the verdict may thereafter make a motion for a new trial, which, if not granted, shall in like manner be acted upon by the reviewing court. Any party who fails to file a motion for a new trial as herein provided shall be deemed to have waived the right to apply for a new trial."

[5] Counsel for plaintiff insists that the failure of the trial court to pass upon the motions for a new trial in the judgment order was not only a violation of Rule 22 but that it was highly prejudicial to the rights of plaintiff because it "forced a piecemeal trial of the case." The provision in Rule 22, upon which plaintiff relies, was intended to aid the party who secured the verdict of the jury, in case of appeal. The record shows that counsel for plaintiff was present at the time the judgment was entered and he owed not only a duty to the trial court but a duty to his client to call the court's attention to the pending motions for a new trial. There is nothing in the record to show that he called the court's attention to the pending motions or to the provision of Rule 22. He now seeks to evade the effect of his nonaction at the time of the entry of the judgments by claiming that the trial judge deliberately ignored the provisions of Rule 22 at the insistence of defendants and that the court, "disregarding the plain mandate of Rule 22 of our Supreme court, the Trial Judge forced a piecemeal trial of the case," "thereby putting this plaintiff appellant to the burden of a double appeal and trial of his cause, with all

its attendant labor and expenses." There is nothing in the record to support these wholly unwarranted statements and it is somewhat surprising that counsel should see fit to make them. Counsel for the defendants state that the failure of the trial judge to pass upon the motions for new trial was due to the fact that counsel for plaintiff and counsel for the defendants inadvertently failed to call the attention of the court to the pending motions for new trial. Counsel for plaintiff had no right to stand silent when the trial court entered the judgment order, and he will not be permitted to now contend that plaintiff was prejudiced by reason of the order. (See Allen v. Sanders, 369 Ill. 466, 469; see, also, Rohrhof v. Schmidt, 218 Ill. 585, 587.)

Plaintiff cites many cases that hold that rules of court have the same force as law. He relies strongly upon People v. Feinberg, 348 Ill. 549. That case is distinguished in People v. Davis, 357 Ill. 396, where Judge Prystalski, a judge of the Circuit court and serving as chief justice of the Criminal court, impaneled the August, 1933, grand jury, which returned an indictment against the defendant. The defendant, by motion to quash the indictment and by motion in arrest of judgment, questioned the legality of Judge Prystalski's assignment to the Criminal court and his elevation to the chief justiceship as done in violation of certain rules of the Circuit and Superior courts of Cook county. The Supreme court, in passing upon the contention of the defendant, states (pp. 399, 340, 341):

"Defendant leans quite heavily on the case of People v. Feinberg, 348 Ill. 549, to support his position. On casual inspection that case would seem to hold that court rules are almost inviolate. What was said in that case, however, must be read in the light of the particular facts we had to consider

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Plaintiff cites many cases that hold that rules of court have the same force as law. He relies strongly upon People v. Feinberg, 348 Ill. 549. That case is distinguished in People v. Davis, 357 Ill. 394, where Judge Prystalski, a judge of the Circuit court and serving as chief justice of the Criminal court, impaneled the August, 1933, grand jury, which returned an indictment against the defendant. The defendant, by motion to quash the indictment and by motion in arrest of judgment, questioned the legality of Judge Prystalski's assignment to the Criminal court and his elevation to the chief justiceship as done in violation of certain rules of the Circuit and Superior courts of Cook county. The Supreme court, in passing upon the contention of the defendant, states (pp. 399, 340, 341):

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therein. Judge Feinberg, a judge of the circuit court of Cook county, called and impaneled a special grand jury, he then acting as a judge of the circuit court. He was not, prior to his election, assigned to duty in the criminal court. Careful perusal of the opinion in that case will disclose that we held his action a nullity, not because he had violated a rule of court but because section 26 of article 6 of the constitution applied. The assignment of orders of the circuit and superior courts, based upon the rules of organization of the two courts, naturally should conform substantially to those rules. Rules once adopted by judges of a court, as we said in the Feinberg case, must not be contrary to the constitution and statutes. Such rules will be binding upon the judges, unless in a particular case, for good cause, they should be disregarded.

"Assuming for the moment that the two courts did not make the requisite divisional assignments of those judges who were afterwards assigned to the criminal court, what harm has been done to defendant? He has, it is true, asserted that he has been materially harmed, but a search of the record has failed to unearth any particular thing which militated against his receiving a fair and impartial trial under the law. The bill of exceptions is conclusive that Judge Prystalski was assigned to the criminal court at the same time the remaining judges of the two courts were assigned to certain divisions under the rules. The assignment of judges to the criminal court and the assignment of other judges to divisions were contemporaneous acts. There is one exception to this statement: Judge Prystalski after his election to the circuit court was assigned in June, 1933, to the criminal court. This was a reasonable and practical move, for he had been serving contemporaneously on the criminal court as a judge of the superior court, and, furthermore, was chief justice. The order of assignment of June, 1933, in effect con-

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tinued him in his ex-officio office of criminal court judge. Immediately after his assignment in June, 1933, he was made chief justice in order that he might finish out his term as chief justice commenced when on assignment from the superior court. Such procedure expedited the work of the criminal court, and by preventing a waste of time and labor redounded greatly to the benefit of litigants and lawyers entitled to an expeditious disposal of their cases.

[3, 4] "Rules of court should be obeyed. This, however, does not imply such unswerving obedience as to preclude reasonable action thereunder where no material harm is done to any litigant or person charged with crime. We can perceive no reason why rules of court should be interpreted or construed more strictly than statutes in general. When we apply the well known canons of construction used in construing general statutes to the rules in question, the inescapable conclusion is that the rules have been substantially complied with, judged by the reason for their existence and the results to be achieved by their operation. Such rules are not mandatory, for in a particular case, for good cause, they may be disregarded. (People v. Feinberg, supra; People v. Smith, 275 Ill. 210.) The failure to first assign the criminal court judges to a division of their respective courts, assuming there was such failure, amounted to no more than the non-observance of an administrative rule of court. Such action did not prevent defendant from having that fair and impartial trial to which he was entitled and did him no harm."

[5, 6] As plaintiff, by his failure to file a report of proceedings, abandoned his right to have the judgments non obstante veredicto tested upon the merits he is in no position to justly complain that he was prejudiced by the failure of the trial court to pass upon the motions for a new trial. It must be remembered that the motion for judgment non obstante veredicto is in the nature of a

thanked him in his ex-officio office of criminal court judge. Immediately after his assignment in June, 1911, he was made chief justice in order that he might finish out his term as chief justice commenced when on assignment from the superior court. Such procedure expedited the work of the criminal court, and by preventing a waste of time and labor redounded greatly to the benefit of litigants and lawyers entitled to a speedy disposal of their cases.

[4] "Rules of court should be obeyed. This, however, does not imply such unswerving obedience as to preclude reasonable action thereunder where no material harm is done to any litigant or person charged with crime. We can conceive no reason why rules of court should be interpreted or construed more strictly than statutes in general. When we apply the well known canons of construction used in construing general statutes to the rules in question, the inescapable conclusion is that the rules have been substantially complied with, judged by the reason for their existence and the results to be achieved by their operation. Such rules are not mandatory, for in a particular case, for good cause, they may be disregarded. (People v. Teighberg, supra; People v. Smith, 277 Ill. 21.) The failure to first assign the criminal court judges to a division of their respective courts, assuming there was such failure, amounted to no more than the non-observance of an administrative rule of court. Such action did not prevent defendant from having that fair and impartial trial to which he was entitled and did him no harm."

[5] As plaintiff, by his failure to file a report of proceedings, abandoned his right to have the judgments non obstante veredicto tested upon the merits he is in no position to justly complain that he was prejudiced by the failure of the trial court to pass upon the motions for a new trial. It must be remembered that the motion for judgment non obstante veredicto is in the nature of a

demurrer to the evidence and the question presented on the motion is whether there is any evidence fairly tending to prove the plaintiff's complaint. In the instant case the trial court, by entering the judgments, held, in effect, that there was no evidence to prove plaintiff's complaint, and plaintiff, because of his failure to file a report of proceedings, is now unable to challenge the correctness of the court's holding.

[7] We hold that the judgment order entered by the trial court is not null and void, and as it stands unchallenged upon the merits it must be affirmed. The present contention of plaintiff is plainly an afterthought.

The defendants have filed a motion to dismiss plaintiff's appeal and strenuously contend that plaintiff filed his record on appeal in this court beyond the time provided by the rules of this court and it is obligatory upon us to grant that motion. While this contention is not without force, we have decided to deny the motion.

The judgment order of the Circuit court of Cook county of October 23, 1945, is affirmed in toto.

JUDGMENT ORDER AFFIRMED IN TOTO.

Sullivan, P. J., and Friend, J., concur.

demurrer to the evidence and the question presented on the motion is whether there is any evidence fairly tending to prove the plaintiff's complaint. In the instant case the trial court, by sustaining the demurrer, held, in effect, that there was no evidence to prove plaintiff's complaint, the plaintiff, because of his failure to file a report of proceedings, is now unable to challenge the correctness of the court's holding.

We hold that the judgment order entered by the trial court is not fully and void, and as it stands unchallenged upon the record it must be affirmed. The general proposition of statutory in plainly an afterthought.

The defendants have filed a motion to dismiss plaintiff's appeal and strenuously urge that plaintiff's sole remedy on appeal in this court lies in the procedure by the rules of this court and is a mandatory one, to avoid that motion. While this contention is not without force, it is inadvisable to decide the motion.

The judgment order of the Circuit Court of Cook County of October 23, 1947, is affirmed as to both.

Judgment order affirmed as to both.

Miller, P. J., and Friend, J., concur.

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PAUL H. REITMAN and NELL REITMAN, his Wife, Appellees, v. GEORGE D. POULAKIDAS SONS, INC., a corporation, and GEORGE POULOS, Appellants.	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiffs, owners of certain premises in Chicago, filed their complaint in which they prayed that a certain instrument in writing dated September 20, 1944, between them and defendant George D. Poulakidas Sons, Inc., being articles of agreement for a warranty deed, which was filed for record by said defendant in the Recorder's Office of Cook county, be declared null and void, canceled and removed as a cloud upon the title of plaintiffs to the said premises; and that a purported claim for lien filed by defendant George D. Poulos in the Circuit court of Cook county be declared null and void, canceled and removed as a cloud upon the title of plaintiffs to the said premises. Defendants filed a joint and several answer to the complaint and defendant corporation filed a complaint at law against plaintiffs to recover damages and a demand for a jury trial as to that complaint. Defendant Poulos filed a complaint against plaintiffs to foreclose a mechanic's lien. Plaintiffs filed answers to the action at law and to the said complaint and "this cause" was referred to a master in chancery "to take the proof of the respective parties * * * and report the same, together with his conclusions, to the court as speedily as possible." When plaintiffs rested their case defendants filed a written motion to dismiss the complaint for want of equity

43850

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and counsel for defendants contended before the master that the latter had no power to rule on that motion, and he cited in support of his contention the case of Kanauske v. Clark, 388 Ill. 357. The position of defendants was, and is, that it was the duty of the master to report to the chancellor the evidence introduced by plaintiffs and the motion of defendants, and that it was the duty of the chancellor to pass upon defendants' motion. After a discussion between counsel and the master, not reported, as to the merits of the motion, the master ordered that "the further hearing of the above entitled cause was continued sine die." The record then shows the following notice:

"Please take notice that defendants' motion to dismiss the complaint herein filed before me on November 6th, A. D. 1945, at the conclusion of plaintiffs' evidence, for want of equity, after due consideration of the transcript of proceedings and the exhibits received in evidence, is overruled and a rule is hereby entered upon all parties to close proofs herein on January 2nd, 1946, before me at my hearing room, * * * at the hour of 2:00 o'clock in the afternoon, at which time and place you and each of you may appear if you see fit so to do.

"Dated this 20th day of December, A. D. 1945.

"LLEWELLYN A. WESCOTT,
"MASTER IN CHANCERY."

The record also shows that on January 2, 1946, at 2 o'clock P.M., the following transpired before the master: That counsel for plaintiff appeared for them and no one appeared for defendants; that the master permitted plaintiffs to call as a witness Reuben Stiglitz, who testified concerning the claim of Poulakidas (also known as Poulos), defendant, for a mechanic's lien. This evidence related to the defense of plaintiffs to the claim of Poulakidas for a mechanic's lien, but the record does not show why the master allowed this evidence to be

and counsel for defendants contended before the master that the latter had no power to rule on that motion, and he cited in support of his contention the case of Kanawake v. Clark, 388 Ill. 397. The position of defendants was, and is, that it was the duty of the master to report to the chancellor the evidence introduced by plaintiffs and the motion of defendants, and that it was the duty of the chancellor to pass upon defendants' motion. After a discussion between counsel and the master, not reported, as to the merits of the motion, the master ordered that "the further hearing of the above entitled cause was continued sine die." The record then shows the following notice:

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"Dated this 20th day of December, A. D. 1945.

"LAWRENCE A. WEGGENT,
"MASTER IN CHANCERY."

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prematurely given. At the completion of the examination of Stiglitz the following occurred: "The Master: Is that all the proofs that you have to offer, Mr. Spitz [attorney for plaintiffs]? Mr. Spitz: Yes, that is all that we have. The Master: I haven't heard from Mr. Breakstone [attorney for defendants] and as notice of closing of proofs was duly issued for this time, I declare proofs closed, the defendants not appearing to put in any testimony. If you will complete the transcript of proceedings, I will consider the case and issue my report as soon as possible. ---Proofs Closed---" The master thereafter filed his final report, in which he found, inter alia, the following:

"18. I further find that the Defendants failed to introduce any evidence in this cause whatsoever to sustain the issues raised by them in their pleadings and that the motion to dismiss complaint filed by them herein on November 6, 1945, is not properly taken and that the Plaintiffs did make out a cause of action and their said Complaint should not be dismissed for want of equity but rather in all its contentions sustained according to the evidence received before me in this cause and consideration of the exhibits offered and introduced in connection with same."

"20. I further find that all of the mechanic's lien claims hereinbefore specifically referred to in Paragraph 10 under the general heading entitled 'Pleadings' of this Report, with the exception of the mechanic's lien claim filed by Defendant George D. Poulos, have been paid by the Plaintiffs herein."

The master recommended that the instrument filed by George D. Poulakidas Sons, Inc., defendant, in the Office of the Recorder of Deeds of Cook county be declared null and void and should be canceled and removed by decree of the court as a cloud upon the title of plaintiffs to the real estate in question, and that the claim of George D. Poulos, defendant, for a mechanic's lien filed

prematurely given. At the completion of the examination of Stiglitz the following occurred: "The Master: Is that all the proofs that you have to offer, Mr. Spitz [attorney for plaintiffs]? Mr. Spitz: Yes, that is all that we have. The Master: I haven't heard from Mr. Bresnstone [attorney for defendants] and as notice of closing of proofs was duly issued for this time, I declare proofs closed, the defendants not appearing to put in any testimony. If you will complete the transcript of proceedings, I will consider the case and issue my report as soon as possible. ---Proofs Closed---" The master thereafter filed his final report, in which he found, inter alia, the following:

"18. I further find that the Defendants failed to introduce any evidence in this cause whatsoever to sustain the issues raised by them in their pleadings and that the motion to dismiss complaint filed by them herein on November 6, 1949, is not properly taken and that the Plaintiffs did make out a cause of action and their said Complaint should not be dismissed for want of equity but rather in all its contentions sustained according to the evidence received before me in this cause and consideration of the exhibits offered and introduced in connection with same."

"20. I further find that all of the mechanic's lien claims hereinbefore specifically referred to in Paragraph 10 under the general heading entitled 'Pleadings' of this Report, with the exception of the mechanic's lien claim filed by Defendant George D. Poulos, have been paid by the Plaintiffs herein."

The master recommended that the instrument filed by George D. Poulakidas Sons, Inc., defendant, in the Office of the Recorder of Deeds of Cook county be declared null and void and should be cancelled and removed by decree of the court as a cloud upon the title of plaintiffs to the real estate in question, and that the claim of George D. Poulos, defendant, for a mechanic's lien filed

in the Office of the Clerk of the Circuit court of Cook county be declared null and void and ordered canceled and removed as a cloud upon the title of plaintiffs in and to the premises in question; that the complaint of defendant Poulos to foreclose his mechanic's lien should be denied. Defendants filed many objections to the master's report. In our view of this appeal it is not necessary to consider all of them. Defendants objected to the report upon the ground "that the master was wholly without jurisdiction to make said report in the nature and form as therein submitted in that on November 6, A. D. 1945 at the close of plaintiffs' evidence in the above entitled cause, the defendants, George D. Poulakidas Sons, Inc., a corporation, and George Poulos, filed their motion directed to the Court to dismiss the complaint and the said cause of action therein stated for want of equity; and that thereupon it became the duty of the Master to report findings of fact based on the plaintiffs' evidence to the Court for consideration in that the said Master is a ministerial officer and without authority to pass upon the said motion of the defendants so made and filed as aforesaid to dismiss said complaint and the cause of action made at the conclusion of plaintiff's evidence, but that said Master purported on the 20th day of December, A. D. 1945, and being without jurisdiction in the premises, to overrule said motion 'after due consideration of the transcript of proceedings and the exhibits received in evidence' and thereupon entered a rule upon all parties to close proofs herein on January 2, A. D. 1946.

"That the matter of defendants' motion to dismiss the complaint and the cause of action at the close of plaintiffs' evidence for want of equity, has never been considered by the Court or the Chancellor and remains pending, undisposed of and undecided in this cause.

in the office of the Clerk of the Circuit Court of Cook County be declared null and void and ordered cancelled and removed as a cloud upon the title of plaintiffs in and to the premises in question; that the complaint of defendant seeks to foreclose his mechanic's lien should be denied. Defendants filed many objections to the master's report. In our view of this appeal it is not necessary to consider all of them. Defendants objected to the report upon the ground "that the master was wholly without jurisdiction to make said report in the matters and form as therein submitted in that on November 4, A. D. 1949 at the close of plaintiffs' evidence in the above entitled cause, the defendants, George F. Pomilaides Sons, Inc., a corporation, and George Pomilos, filed their motion directed to the Court to dismiss the complaint and the said cause of action therein stated for want of equity; and that thereupon it became the duty of the Master to report findings of fact based on the plaintiffs' evidence to the Court for consideration in that the said Master is a ministerial officer and without authority to pass upon the said motion of the defendants so made and filed to dismiss said complaint and the cause of action here at the conclusion of plaintiffs' evidence, but that said Master purported on the 10th day of November, A. D. 1949, and being without jurisdiction in the premises, to overrule said motion after due consideration of the transcript of proceedings and the exhibits received in evidence; and thereupon entered a rule upon all parties to close proofs herein on January 9, A. D. 1950.

"That the matter of defendants' motion to dismiss the complaint and the cause of action at the close of plaintiffs' evidence for want of equity, has never been considered by the Court or the Chancellor and remains pending, undisposed of and undecided in this cause.

"* * *

"Defendants object and except to the said report of the Master in that the same has denied to the defendants due process of law, that the Master has exceeded his jurisdiction and authority and by the findings and recommendations in said report contained without obtaining the judgment of the Court upon the motion herein to dismiss, has prejudged the said cause in favor of the plaintiffs and without providing the defendants with an opportunity to introduce evidence to obtain a hearing in said cause, in the event of an adverse ruling by the Court upon the said motion, filed by the said defendants herein."

The objections of defendants to the master's report were allowed to stand as exceptions to the report and the cause came on to be heard by the chancellor upon the pleadings and the "Motion to Dismiss Complaint" of defendants, and the report of the master, and a decree was entered in conformity with the recommendations of the master. The decree contained, inter alia, the following findings:

"18. The court further finds that the defendants failed to introduce any evidence in this cause whatsoever to sustain the issues raised by them in their pleadings and that the motion to dismiss complaint filed by them herein on November 6, 1945, is not properly taken and that the plaintiffs did make out a cause of action and their said complaint should not be dismissed for want of equity but rather in all its contentions sustained according to the evidence received before the Master in this cause and consideration of the exhibits offered and introduced in connection with same.

"* * *

"20. The court further finds that all of the mechanic's lien claims hereinbefore specifically referred to in Paragraph 10 with the exception of the mechanic's lien claim filed by

"* * *

"Defendants object and except to the said report of the Master in that the same has denied to the defendants due process of law, that the Master has exceeded his jurisdiction and authority and by the findings and recommendations in said report contained without obtaining the judgment of the Court upon the motion herein to dismiss, has prejudged the said cause in favor of the plaintiffs and without providing the defendants with an opportunity to introduce evidence to obtain a hearing in said cause, in the event of an adverse ruling by the Court upon the said motion, filed by the said defendants herein."

The objections of defendants to the master's report were allowed to stand as exceptions to the report and the cause came on to be heard by the chancellor upon the pleadings and the "Motion to Dismiss Complaint" of defendants, and the report of the master, and a decree was entered in conformity with the recommendations of the master. The decree contained, inter alia, the following findings:

"18. The court further finds that the defendants failed to introduce any evidence in this cause whatsoever to sustain the issues raised by them in their pleadings and that the motion to dismiss complaint filed by them herein on November 6, 1945, is not properly taken and that the plaintiffs did make out a cause of action and their said complaint should not be dismissed for want of equity but rather in all its contentions sustained according to the evidence received before the Master in this cause and consideration of the exhibits offered and introduced in connection with same.

"* * *

"20. The court further finds that all of the mechanic's lien claims hereinbefore specifically referred to in Paragraph 10 with the exception of the mechanic's lien claim filed by

defendant, George D. Poulos, have been paid by the plaintiffs herein.

"21. The court further finds that the equities of this cause are with the plaintiffs and the defendants were dilatory in presenting any defense to the plaintiffs' cause of action and that the said defendants have, by their failure to introduce any evidence after the ruling by the Master taking the defendants' motion to dismiss and the defendants at said time failing to present the said ruling to the court promptly, have now estopped themselves from presenting any evidence, it appearing to the court that the defendant, George D. Poulakidas Sons, Inc., has failed to pay any part of the purchase price, and the said Poulos has failed to pay for any work or labor in connection with the said premises as determined by the court in open court."

A number of points are urged by defendants in support of their contention that the decree cannot be sustained. We deem it necessary to refer to one only, viz: In a hearing before a master, where a motion to dismiss is made by the defendant at the close of the plaintiff's evidence, the master is without authority to rule on the motion, and under the provisions of sec. 64, par. (4) of the Civil Practice Act (ch. 110, par. 188, Ill. Rev. Stat. 1945), such a motion does not prevent the defendant from offering evidence to support his defense in the event the decision on the motion is adverse to him; that the court should not have entered final judgment, but should have remanded the cause to the master with directions to proceed with the taking of evidence in behalf of defendants. Defendants strenuously complain that they have been denied their day in court. A careful consideration of the record satisfies us that this complaint is a meritorious one. Before par. (4) of sec. 64 of the Civil Practice Act was enacted, the making of a motion to dismiss a complaint at the conclusion of the plaintiff's evidence amounted to a submission of the cause

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on the evidence taken. (Kanauske v. Clark, supra, p. 359.) But par. (4), sec. 64, provides:

"(4) Upon the trial of a proceeding in equity defendant may, at the close of plaintiff's case, move for a finding in his favor or move to dismiss the suit for want of equity. Either motion shall constitute a submission of the cause for decision on the merits. If the decision on the motion is adverse to the defendant he may proceed to adduce evidence in support of his defense, in which event the motion to dismiss or a finding shall be deemed to have been waived and withdrawn."

Since the passage of that statute, "if the decision on the motion is adverse to the defendant, he may proceed to adduce evidence in support of his defense, in which event the motion to dismiss or for a finding shall be deemed to have been waived and withdrawn." (See Kanauske v. Clark, supra, pp. 359, 360.) The position taken by defendants before the master, that the latter was without power to pass upon the motion and that it was his duty to report to the chancellor the evidence introduced by plaintiffs and the motion of defendants, and that it was the duty of the chancellor to pass upon defendants' motion, finds support, inferentially, at least, in Kanauske v. Clark, supra. Defendants argue that as they were seriously contending that plaintiffs had failed to make out a prima facie case they should not be obliged to present their evidence until the chancellor had passed upon their motion; that passing upon their motion called for the exercise of judicial power not granted to a master. When the chancellor passed upon the motion, as he did in the decree, and held that the motion was not properly taken and that "the plaintiffs did make out a cause of action," it then became his duty under par. (4), sec. 64, to re-refer the cause to the master with directions to take evidence in the matter of defendants' defense to plaintiffs' complaint, and

on the evidence taken. (Lamourie v. Clark, supra, p. 379.)

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also in the matter of the complaint of defendant Poulos to foreclose his mechanic's lien, unless there was some very strong reason why defendants should be deprived of their right to offer evidence. This was an equitable proceeding, and equity jealously guards the fundamental right of a party to a suit to have his day in court. The chancellor sought to justify his action in not re-referring the cause to the master by finding that "defendants were dilatory in presenting any defense to the plaintiffs' cause of action and that the said defendants have, by their failure to introduce any evidence after the ruling by the Master taking the defendants' motion to dismiss and the defendants at said time failing to present the said ruling to the court promptly, have now estopped themselves from presenting any evidence." This finding and conclusion of the chancellor does not appeal to our sense of justice. Before the master defendants were relying upon Kanauske v. Clark, supra, to support their contention that the master was without jurisdiction to pass upon defendants' motion and that it was his duty to report to the chancellor the evidence introduced by plaintiffs and the motion of defendants, that it was the duty of the chancellor to pass upon defendants' motion and that they were not bound to put in any defense to plaintiffs' cause of action until after the chancellor had passed upon their motion. Even if defendants' counsel misinterpreted the decision in Kanauske v. Clark, supra, we do not think that that fact would justify the drastic ruling by the chancellor. As to the finding by the chancellor that defendants failed to present to the court promptly the ruling of the master upon their motion to dismiss, it is sufficient to say that defendants were unable to present the matter to the chancellor until the master's report was prepared and submitted to the chancellor, and there is nothing in the record to warrant a finding that defendants were dilatory in presenting the question to the chancellor. Indeed, plaintiffs

also in the matter of the complaint of defendant Forlos to foreclose his mechanic's lien, unless there was some very strong reason why defendants should be deprived of their right to offer evidence. This was an equitable proceeding, and equity jealously guards the fundamental right of a party to a suit to have his day in court. The chancellor sought to justify his action in not referring the cause to the master by finding that "defendants were dilatory in presenting any defense to the plaintiffs' cause of action and that the said defendants have, by their failure to introduce any evidence after the ruling by the master taking the defendants' motion to dismiss and the defendants at said time failing to present the said ruling to the court promptly, have now stopped themselves from presenting any evidence." This finding and conclusion of the chancellor does not appeal to our sense of justice. Before the master defendants were relying upon Kamauoke v. Clark, supra, to support their contention that the master was without jurisdiction to pass upon defendants' motion and that it was his duty to report to the chancellor the evidence introduced by plaintiffs and the motion of defendants, that it was the duty of the chancellor to pass upon defendants' motion and that they were not bound to put in any defense to plaintiffs' cause of action until after the chancellor had passed upon their motion. Even if defendants' counsel misinterpreted the decision in Kamauoke v. Clark, supra, we do not think that that fact would justify the drastic ruling by the chancellor. As to the finding by the chancellor that defendants failed to present to the court promptly the ruling of the master upon their motion to dismiss, it is sufficient to say that defendants were unable to present the matter to the chancellor until the master's report was prepared and submitted to the chancellor, and there is nothing in the record to warrant a finding that defendants were dilatory in presenting the question to the chancellor. Indeed, plaintiffs

had the right to bring the matter before the chancellor and there is nothing in the record to show that defendants did anything to prevent a prompt hearing of the matter. Plaintiffs rely strongly upon the following finding in the decree: "* * * it appearing to the court that the defendant, George D. Poulakidas Sons, Inc., has failed to pay any part of the purchase price, and the said Poulos has failed to pay for any work or labor in connection with the said premises as determined by the court in open court." (Italics ours.) They insist that the foregoing language warrants us in concluding that the chancellor, in open court, interrogated "the defendant" and found from his answers "that the defendant, George D. Poulakidas Sons, Inc., had failed to pay any part of the purchase price, and the said Poulos had failed to pay for any work and labor in connection with the premises." We refuse to hold that the finding in question shows that defendants had their day in court.

The dismissal of the complaint at law to recover damages filed by defendant corporation against plaintiffs, in which the plaintiff demanded a jury trial, was entirely unwarranted. Plaintiffs attempt to justify the dismissal upon the ground that "defendants did not preserve the question of dismissal of the complaint at law and the mechanic's lien, in the objections to the Master's report, which stood as exceptions." It is a sufficient answer to this argument to say that the complaint at law was not and could not properly be referred to the master, and that the latter would have no jurisdiction to pass upon the same. Indeed, because a jury trial had been demanded, the chancellor had no power to determine the merits of that complaint.

The decretal judgment of the Superior court of Cook county is reversed in toto, and the cause is remanded with directions to the trial court to re-refer the cause to the master for the taking of evidence in behalf of defendants on their joint and

had the right to bring the matter before the chancellor and there is nothing in the record to show that defendants did anything to prevent a prompt hearing of the matter. Plaintiffs rely strongly upon the following ruling in the decree: "* * * it appearing to the court that the defendant, George E. Konikides Home, Inc., has failed to pay any part of the purchase price, and the said Konikes has failed to pay for any work or labor in connection with the said premises as determined by the court in open court." (Italics ours.) They insist that the foregoing language warrants us in concluding that the chancellor, in open court, interrogated "the defendant" and formed from his answers "that the defendant, George E. Konikides Home, Inc., had failed to pay any part of the purchase price, and the said Konikes had failed to pay for any work and labor in connection with the premises." We refuse to hold that the finding is justification there that defendants had thereby any to court.

The dismissal of the complaint at law to recover damages filed by defendant corporation against plaintiff, in which the plaintiff demanded a jury trial, was entirely warranted. Plaintiffs attempt to justify the dismissal upon the ground that defendants did not preserve the position of thereafter of the complaint at law and the chancellor's view, in the objections to the master's report, which stood as exceptions." It is a sufficient answer to this argument to say that the complaint at law was not and could not properly be referred to the master, and that the latter would have no jurisdiction to pass upon the case. Indeed, because a jury trial had been demanded, the chancellor had no power to determine the merits of that complaint.

The decretal judgment of the Superior court of Cook county is reversed in toto, and the cause is remanded with directions to the trial court to re-refer the cause to the master for the taking of evidence in behalf of defendants on their joint and

several answer to plaintiffs' complaint and to hear evidence as to the complaint to foreclose mechanic's lien filed by defendant Poulos, and for further proceedings not inconsistent with this opinion.

DECRETAL JUDGMENT REVERSED
IN TOTO AND CAUSE REMANDED
WITH DIRECTIONS.

Sullivan, P. J., and Friend, J., concur.

several answer to plaintiffs' complaint and to hear evidence as to the complaint to foreclose mechanic's lien filed by defendant Toulos, and for further proceedings not inconsistent with this opinion.

DECREETAL JUDGMENT REVERSED IN PART AND CAUSE REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Friend, J., concur.

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TURNER C. FREENY, Appellant,

v.

EFFIE FREENY, Appellee.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

330 I.A. 616

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Turner C. Freeny, plaintiff, appellant, filed his complaint against Effie Freeny, defendant, appellee, for divorce, in which pleading he alleged that defendant had committed adultery with several persons, "some of whose names are unknown to plaintiff and some of them are known to this plaintiff." The cause was tried by the chancellor, Judge Schnackenberg, without a jury, and at the conclusion of the evidence, on November 16, 1945, a decree was entered dismissing plaintiff's complaint for want of equity. Plaintiff appealed to this court, and on December 31, 1946, we filed an opinion affirming that decree. In our opinion we stated that "the only question presented for our determination is whether the decree and the findings contained therein were against the manifest weight of the evidence," and after a review of the evidence we held that the testimony of several of plaintiff's witnesses was "not only highly improbable but fantastic and absurd," and that "in view of the nature and character of the testimony presented in plaintiff's behalf, most of which must have appeared to the chancellor as pure fabrication, it certainly cannot be said that the decree was against the manifest weight of the evidence." On February 11, 1946, plaintiff filed his notice of appeal from the decree of the Circuit court. On June 21, 1946, counsel for defendant served notice on counsel for plaintiff that they would on June 24, 1946, at the hour of 10 o'clock A.M., appear before Judge Schnackenberg and present a petition of Effie Freeny

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TURNER C. FREENY, appellant, v. ELFIE FREENY, appellee.	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Turner C. Freeny, plaintiff, appellant, filed his complaint against Elfie Freeny, defendant, appellee, for divorce, in which pleading he alleged that defendant had committed adultery with several persons, "some of whose names are unknown to plaintiff and some of them are known to this plaintiff." The cause was tried by the chancellor, Judge Schmaekenberg, without a jury, and at the conclusion of the evidence, on November 16, 1945, a decree was entered dismissing plaintiff's complaint for want of equity. Plaintiff appealed to this court, and on December 21, 1946, we filed an opinion affirming that decree. In our opinion we stated that "the only question presented for our determination is whether the decree and the findings contained therein were against the manifest weight of the evidence," and after a review of the evidence we held that the testimony of several of plaintiff's witnesses was "not only highly improbable but fantastic and absurd," and that "in view of the nature and character of the testimony presented in plaintiff's behalf, most of which must have appeared to the chancellor as pure fabrication, it certainly cannot be said that the decree was against the manifest weight of the evidence." On February 11, 1946, plaintiff filed his notice of appeal from the decree of the circuit court. On June 21, 1946 counsel for defendant served notice on counsel for plaintiff that they would on June 24, 1946, at the hour of 10 o'clock A.M., appear before Judge Schmaekenberg and present a petition of Elfie Freeny

and ask for the entry of an order in accordance with the prayer of the petition. On June 24, 1946, defendant filed the following certified petition before Judge Schnackenberg:

"Your petitioner, Effie Freeny, respectfully represents that she was the defendant in the above entitled cause;

"2. That heretofore on the 16th day of November, 1945, a decretal order was entered dismissing this cause for want of equity.

"3. That on February 11, 1946, the plaintiff, Turner C. Freeny, filed a notice of appeal in the above entitled cause to the Appellate Court of Illinois, First District; that said appeal is now in the Appellate Court of Illinois, First District.

"4. Your petitioner further represents that she has been compelled to employ attorneys to represent her in the Appellate Court of Illinois, First District, and protect and defend her rights herein.

"5. That the said defendant is a strong, able-bodied man earning a substantial income and is abundantly able to pay counsel to protect and defend the rights of the defendant herein.

"6. That the defendant is without sufficient funds to protect and defend her rights in the above entitled cause and pay the costs in the Appellate Court of Illinois, First District.

"Wherefore, your petitioner prays that she be allowed the sum of Two Hundred Fifty (250.00) Dollars, instanter, on account of suit money and attorneys' fees and such other and further sums as to your Honor shall seem meet in protecting the rights of the defendant herein on appeal.

[Signed] "Effie Freeny"

On June 24, 1946, Judge Schnackenberg entered an order that plaintiff pay to defendant "the sum of $250.00 dollars, on account of suit money and attorneys' fees in defending this cause in the Appellate Court of Illinois, First District, payable 10 days from

and ask for the entry of an order in accordance with the prayer of the petition. On June 24, 1946, defendant filed the following certified petition before Judge Schmackenberg:

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"Therefore, your petitioner prays that she be allowed the su of Two Hundred Fifty ($250.00) Dollars, instanter, on account of money and attorneys' fees and such other and further sums as to your Honor shall seem meet in protecting the rights of the defend ant herein on appeal.

[Signed] "Effie Freeny"

On June 24, 1946, Judge Schmackenberg entered an order that plaintiff pay to defendant "the sum of $250.00 Dollars, on account of suit money and attorneys' fees in defending this cause in the Appellate Court of Illinois, First District, payable 10 days from

the date of this order." On June 28, 1946, plaintiff filed a verified petition praying that the order of June 24, 1946, be vacated. On the same date an order was entered granting him leave to file his petition, but further ordering that the motion of defendant to strike the said petition was allowed. Plaintiff has appealed from the order of June 24, 1946, and also from the order of June 28, 1946.

It will be noted that the chancellor who entered the two orders appealed from tried the divorce proceedings. From the records of this court we know the nature of the case presented by plaintiff in the divorce proceedings and that justice demanded that defendant be allowed a reasonable sum in defending the decree of the Circuit court in this court. We are satisfied, from the record that was before us upon the appeal from the decree, that plaintiff would resort to improper methods to obtain a divorce from his wife.

Plaintiff contends "that the record discloses no petition on file by the defendant for the allowance of said fees. There was nothing before the court but the oral motion of counsel for the defendant." It is true that the record filed in this court by plaintiff does not show that a petition was on file at the time of the allowance of the fees, and the praecipe for record also shows that plaintiff intentionally omitted from the record the petition filed by defendant. Defendant was compelled to file an additional record to show that there was a verified petition filed by defendant for the allowance of fees, and that the chancellor had that petition before him when he made the allowance.

Plaintiff contends that at the time the chancellor made the allowance there was no showing that any briefs or abstracts had been filed in the Appellate court; that "in the case at bar the services had not yet been rendered, and no one could possibly know what they would be or the value thereof." Plaintiff's

the date of this order." On June 26, 1946, plaintiff filed a verified petition praying that the order of June 24, 1946, be vacated. On the same date an order was entered granting him leave to file his petition, but further ordering that the motion of defendant to strike the said petition was allowed. Plaintiff has appealed from the order of June 24, 1946, and also from the order of June 26, 1946.

It will be noted that the chancellor who entered the two orders appealed from tried the divorce proceedings. From the records of this court we know the nature of the case presented by plaintiff in the divorce proceedings and that justice demanded that defendant be allowed a reasonable sum in defending the decree of the circuit court in this court. We are satisfied, from the record that was before us upon the appeal from the decree, that plaintiff could resort to improper methods to obtain a divorce from his wife.

Plaintiff contends "that the record discloses no petition on file by the defendant for the allowance of said fees. There was nothing before the court but the oral motion of counsel for the defendant." It is true that the record filed in this court by plaintiff does not show that a petition was on file at the time of the allowance of the fees, and the transcript of record also shows that plaintiff intentionally omitted from the record the petition filed by defendant. Defendant was compelled to file an additional record to show that there was a verified petition filed by defendant for the allowance of fees, and that the chancellor had that petition before him when he made the allowance.

Plaintiff contends that at the time the chancellor made the allowance there was no showing that any briefs or abstracts had been filed in the appellate court; that "in the case at bar the services had not yet been rendered, and no one could possibly know what they would be or the value thereof." Plaintiff's

appeal was perfected when he filed his notice of appeal on February 11, 1946 (People v. Grabs, 373 Ill. 423), and defendant then had the right to apply for fees to defend the decree. The chancellor who entered the orders appealed from was familiar with all of the facts of the case, and we are in a position to know that the amount he allowed defendant was a reasonable one.

We find no merit in plaintiff's contention that this record does not show that defendant is not able to pay her own solicitors' fees and that the record upon the first appeal shows that she is amply able to pay them.

After reading the brief filed by plaintiff, wherein the points made are jumbled together under one head, we are satisfied that there is not the slightest merit in this appeal and that it was filed solely for the purpose of hindering and embarrassing defendant in her defense of the decree entered in the divorce proceedings.

The decretal order of the Circuit court of Cook county entered June 24, 1946, and the decretal order of that court entered June 28, 1946, are both affirmed.

DECRETAL ORDER ENTERED JUNE 24, 1946, AND DECRETAL ORDER ENTERED JUNE 28, 1946, AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

appeal was perfected when he filed his notice of appeal on February 11, 1946 (People v. Crabs, 372 Ill. 422), and defendant then had the right to apply for fees to defend the decree. The chancellor who entered the orders appealed from was familiar with all of the facts of the case, and we are in a position to know that the amount he allowed defendant was a reasonable one.

We find no merit in plaintiff's contention that this record does not show that defendant is not able to pay her own solicitors' fees and that the record upon the first appeal shows that she is amply able to pay them.

After reading the brief filed by plaintiff, wherein the points made are jumbled together under one head, we are satisfied that there is not the slightest merit in this appeal and that it was filed solely for the purpose of hindering and embarrassing defendant in her defense of the decree entered in the divorce proceedings.

The decretal order of the Circuit court of Cook county entered June 24, 1946, and the decretal order of that court entered June 28, 1946, are both affirmed.

[illegible]
1946, and a decretal order entered
June 21, 1946, [illegible].

Sullivan, P. J., and Friend, J., concur.

GENERAL No. 9511. AGENDA No. 4.

IN THE APPELLATE COURT
OF ILLINOIS
THIRD DISTRICT
FEBRUARY TERM, A. D. 1947.

JOHN C. BOEKER, Jr., Plaintiff-Appellant,	APPEAL FROM THE CIRCUIT COURT OF MENARD COUNTY.
-vs-	
ELMER BOEKER, Defendant-Appellee.	~~NORMAN A. COLY, ILLINOIS, Judge Presiding.~~

HAYES, J.:

On July 11, 1945, plaintiff John Boeker, Jr., brought an action of forcible entry and detainer against the defendant Elmer Boeker in the Circuit Court of Menard County. The complaint alleged that John C. Boeker, father of both the parties, died seized and possessed in fee simple of certain real estate which was devised to plaintiff for life. The Complaint further recited that plaintiff was entitled to possession of the premises which were then occupied by the defendant who refused to deliver them up, even after a demand had been served upon him.

Defendant in his answer denied that John C. Boeker had physical possession of the real estate in question at the time of his death, and further averred that defendant

was lawfully in possession of the premises under a written lease from John C. Boeker, Sr., which did not expire until March 1, 1947. Thereafter plaintiff filed a replication denying that defendant was in lawful possession of the premises by virtue of this lease. Four days prior to the trial, defendant amended his answer alleging that he was in possession of the premises as a tenant from year to year. Plaintiff then filed a denial that defendant was a tenant from year to year.

At the trial before the court without a jury certain facts were stipulated, including the will of John C. Boeker and the inventory in the estate. Plaintiff's demand for possession addressed to defendant was admitted in evidence without objection and thereupon plaintiff rested. Defendant offered no evidence and the court entered judgment for ~~plaintiff~~ defendant. It appears from the record that plaintiff alleged and proved that he had a life estate in the real estate in question and the presumption therefore arises that he was entitled to its possession. 22 C. J. 125, Section 64. Defendant set up in his pleadings two defenses: first, that he was entitled to possession under a written lease from plaintiff's predecessor in title; the other that he was a tenant from year to year. Defendant offered no evidence to support these allegations however and since they were denied by plaintiff, they are of no avail to the defendant.

It is clear that forcible entry and detainer was plaintiff's proper remedy and that defendant even though in actual possession of the premises, with permission of

plaintiff's predecessor in title is subject to dispossession. Peters v. Balke, 170 Ill. 304, 48 N.E. 1210.

The judgment of the circuit court of Menard County is therefore reversed and the cause remanded, to that court with directions to enter judgment for the plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

Abstract

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GENERAL NO. ~~NUMBER~~ 9520. AGENDA NO. ~~NUMBER~~ 7.

330 I.A. 617

IN THE APPELLATE COURT

OF ILLINOIS

THIRD DISTRICT

FEBRUARY TERM, A. D. 1947.

JOHN L. STONE, Plaintiff-Appellee,	APPEAL FROM THE CIRCUIT COURT OF MACOUPIN COUNTY.
vs.	
CLARA MARIE STONE, Defendant-Appellant.	~~HONORABLE L. E. WILMITE, Judge Presiding.~~

HAYES, J.:

The plaintiff, John L. Stone, and the defendant, Clara Marie Stone were married on March 22, 1944, and a daughter was born to them in November of that year. In March of 1945, plaintiff filed suit for divorce against defendant and they were separated for nineteen days. Thereafter, the suit was dismissed by plaintiff and plaintiff and defendant again lived together as man and wife. In August of 1945, plaintiff again filed suit for divorce, and that suit was also dismissed. In October, 1945, plaintiff filed this suit in the circuit court of Macoupin County, and a default decree was entered on November 27, 1945. On December 4, 1945, defendant filed her motion to set aside the default decree which motion was allowed. Thereupon an answer was filed by defendant together with a counterclaim asking for a decree of separate maintenance. On April 9, 1946, the circuit court of Macoupin County entered a decree

for plaintiff granting him a divorce and awarding him custody of his minor child. Defendant has appealed from this decree.

Plaintiff charged that defendant was guilty of adultery with his brother, Dean Stone. The latter, a witness for plaintiff, testified to repeated intimacies with the defendant and on one occasion, on August 19, 1945, there is corroborating evidence of witnesses who accompanied plaintiff when he discovered defendant and Dean Stone in the latter's bedroom. All of the acts, including the events of August 19, 1945 were denied by defendant, and the testimony of her parents who were with plaintiff on this latter date, conflicts with that of the other witnesses present.

Defendant in addition to denying the alleged adulterous acts, contends that she and her husband cohabited as man and wife after these acts were supposed to have occurred, and that plaintiff, knowing of her past conduct, condoned these offenses. Plaintiff denies that he resumed marital relations with his wife and in addition sought to prove that even if condonation were present, defendant was again intimate with Dean Stone, on October 27, 1945, which offense would revive the earlier ones. Defendant denies that the latter offense occurred, although Dean Stone testified that improper relations did take place.

In this case the issues of adultery, condonation and revival are all questions of fact. We believe the weight of the evidence establishes that defendant committed adultery on August 19, 1945. Assuming that plaintiff condoned this offense, there is evidence to support a finding that defendant was again unfaithful on October 27, 1945. It is true that

defendant denies this and that the credibility of Dean Stone is open to question. These matters, however, are primarily matters to be determined by the trial judge who saw and heard the witnesses. Arliskas v. Arliskas, 343 Ill. 112. We believe the decree of the trial court is supported by evidence and should be sustained on this appeal.

The decree of the Circuit Court of Macoupin County is affirmed.

DECREE AFFIRMED.

Abstract

IN THE

APPELLATE COURT

OF ILLINOIS

Third District

February Term, A.D. 1947

General No. 9517 Agenda No. 5

330 I.A. 618

Richard F. Wood, Plaintiff-Appellee, vs. Henry E. Brown, Defendant-Appellant.	Appeal from Circuit Court of Vermilion County.

Wheat, J.

Plaintiff, Richard F. Wood, filed his complaint against defendant, Henry E. Brown, to recover a commission for the sale of real estate belonging to defendant. Trial was had before the Court, resulting in a finding in favor of plaintiff, on which finding judgment was entered against defendant in the sum of $1000 and costs. Defendant appeals.

The basic facts appear to be, from the evidence, that Wood, a licensed real estate broker, successfully negotiated a sale of farm land known as the Bushnell farm of about 280 acres to the purchaser, defendant Brown. Within a few days thereafter, Brown sold the farm to one Joe Brummett who was then in possession of such farm as a tenant of the former owners, for the sum of $30,000.

Plaintiff contends that he had an oral contract with defendant for the sale of the farm for the usual and customary commission, and that the real estate was sold to Brummett through his efforts and that he was the procuring cause of such sale. Defendant denies this and contends that the judgment is contrary to the manifest weight of the evidence, that the court erred in ruling on the admissibility of evidence, and that the court erred in failing to rule on defendant's motion to find for the defendant at the close of all the evidence.

As to the existence of an oral contract to sell the farm for a commission, the evidence of the only two parties in a position to definitely know about it, the plaintiff and the defendant, is sharply conflicting. Certain circumstances, however, tend to corroborate the testimony of the plaintiff, not only as to the existence of the contract but as to his efforts being the procuring cause of the sale. The purchaser, Brummett, a disinterested witness, testified that he had never known Brown until plaintiff brought him out for an interview. Defendant admits this. Prior thereto, plaintiff had talked to witness about buying the farm from Brown. At the occasion of the meeting of plaintiff, defendant, and witness, the latter said Brown had a prior prepared written contract with him. Defendant denies this but his own secretary and witness, Elliott, testified that he had, at Brown's request, prepared a memorandum in duplicate to take out to Brummett. It does not appear reasonable that defendant would cause to be prepared a form of contract before meeting a stranger, if there had not been some intervening negotiations by plaintiff. When the witness, Brummett, paid Brown his initial payment of $5000 on the purchase price, the

Plaintiff correctly that he had an oral contract with defendant for the sale of the farm. In the usual and customary conveyance, and that the real estate was sold to Dunmore through his efforts and that he was the procuring cause of such sale. Defendant denies this and contends that the judgment is contrary to the weight of the evidence, that the court erred in ruling on the admissibility of evidence, and that the court erred in failing to give his defendants motion to find for the defendant at the close of all the evidence.

As to the existence of an oral contract to sell the farm for a commission, the evidence of the only two witnesses is a condition to certainly know about it, the plaintiff and the defendant, is slightly conflicting. Certain circumstances, however, tend to corroborate the testimony of the plaintiff, not only as to the existence of the contract but as to the terms being the property which it was sold. The defendant, Dunmore, a disinterested witness, testified that he had been talked to interested about this. Other witnesses, plaintiff had talked to witness about buying the farm from Dunmore. At the conclusion of the hearing at trial, defendant, but counsel, the learned said there was a verbal contract between plaintiff and defendant whereby this was his own accountant and trustee, filling, testified that he had, at Dunmore's request, arranged a conference in Huntsville to talk and to Dunmore. It does not appear that while that defendant would make it he requested a form of contract before making a commission. If there had not been such conversation negotiations by plaintiff. Some time in August, Dunmore, after been his initial payment of $500 of the purchase price, the

latter told him not to mention it to plaintiff as he didn't need to know anything about the deal. This remark would have been unnecessary unless plaintiff and defendant had some kind of an agreement. In any event, the issues as to the existence of a contract and the procuring cause of the sale are questions of fact, and the findings of the trial court will not be disturbed unless manifestly against the weight of the evidence. It cannot be said that such is the case.

On cross examination of the witness, Brummett, counsel for defendant asked this question: "Was it by any procurement or any offer of Mr. Wood that you bought that place?". No error was committed by the court in sustaining an objection to this question as it called for a conclusion and presented one of the ultimate issues to be decided by the court. The court properly sustained an objection to a similar question put to the defendant, Brown.

It is next urged that the court erred in failing to rule on defendant's motion to find the issues for the defendant, made at the close of all the evidence. It is not apparent that the defendant's rights were prejudiced by the failure of the court to do an unnecessary act, as the finding of the court effectively, by implication at least, disposed of the motion.

It is the opinion of the court that no reversible error appears in the record, and that the finding and judgment of the court was not manifestly against the weight of the evidence. The judgment is accordingly affirmed.

Affirmed.

IN THE

APPELLATE COURT

OF ILLINOIS

Third District

February Term, A.D. 1947

General No. 9528 Agenda No. 11

William Pitts,

Plaintiff-Appellant,

vs.

Lyle Girard,

Defendant-Appellee.

Appeal from Circuit Court of McLean County.

Wheat, J.

On the trial of this suit by the court without a jury, for damages to an automobile, judgment was entered for the defendant, and plaintiff appeals. The sole issue is whether the trial court erred in finding plaintiff guilty of contributory negligence.

Little dispute appears as to the material facts of the case. Defendant was driving his automobile south on Main Street in Bloomington, on October 31, 1945, and stopped for a traffic light at the intersection of Front Street; he was then in the lane just west of and adjacent to the center of the Main Street pavement with his left wheels on the center line of the street; he then had no intention of turning either right or left. Plaintiff was also driving his car south on Main Street, at a speed of fifteen miles per hour, and, as he was about one-half block north of defendant's car, the traffic light turned green; he intended to continue south across Front

Street, and passed the still stopped car of defendant on its right side with a clearance of three or four feet; defendant did not see plaintiff's car pass and started his car with the changed intention of making a right turn into Front Street, and, as he testified, "wound up by running the front end of my car into the back end of his car". The right front fender and bumper of defendant's car contacted the left rear wheel and fender of plaintiff's car to the damage of the latter in the sum of $20.10. No objection was made to testimony that a left turn was illegal at the Front Street intersection.

The trial court, in his opinion, found that the defendant was guilty of negligence, but that plaintiff was guilty of contributory negligence because, having knowledge that a left turn was prohibited, that defendant's car was stopped and could legally turn only to the right, plaintiff was obligated to give warning of his intention to pass.

Section 159 of Chapter 95½, 1945 Illinois Revised Statutes, provides that as to motor vehicles, both the approach for a right turn and a right turn shall be made as close as practical to the right hand curb or edge of the roadway. Inasmuch as defendant's car was stopped with its left wheels on the center line of the pavement, plaintiff would have had no intimation that defendant was about to make a right turn, and was therefore not obligated to give a warning of his passing in anticipating that defendant would violate such statute.

Section 154 (b), Chapter 95½, Illinois Revised Statutes, provides as follows: "The driver of a vehicle may overtake and, allowing sufficient clearance, pass another vehicle proceeding

in the same direction either upon the left or upon the right on a roadway with unobstructed pavement of sufficient width for four or more ~~moving~~ lines of moving traffic when such movement can be made ~~with~~ in safety. * * *". We believe it clear from the evidence that Main Street was of sufficient width for four lines of traffic. Defendant testified that he was in the lane next to the center with his left wheels in the center of the street. Plaintiff testified that with a clearance of three or four feet between cars he passed on the right. Under these circumstances, plaintiff might lawfully have passed defendant's car on the right side.

While an Appellate Court is reluctant to disturb the findings of a trial court, it should do so when such findings appear manifestly against the weight of the evidence. In this case we find no contributory negligence on the part of the plaintiff and agree with the trial court that defendant was negligent. The case is accordingly reversed and remanded, with instructions that judgment be entered for the plaintiff.

Reversed and remanded, with directions.

43641

ALBERT MAKIEL, a minor, etc., Appellant, v. SEARS, ROEBUCK & COMPANY, a corporation, Appellee.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY.

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330 I.A. 619

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is an action to recover damages for personal injuries sustained by plaintiff, a minor, as a result of defendant's alleged negligence in the maintenance of an automobile service station. The cause was tried by a jury. At the conclusion of plaintiff's evidence the trial court directed a verdict in favor of defendant Sears, Roebuck & Company, hereinafter called "Sears." There was a verdict and judgment in plaintiff's favor for $50,000 against defendant Helen T. Hood, which was subsequently vacated and on plaintiff's motion defendant Hood was dismissed from the cause. Plaintiff Makiel appeals.

On oral argument before this court plaintiff's counsel stated that a settlement was made of the judgment against defendant Hood.

The essential facts are uncontroverted. On May 9, 1935 defendant Sears operated an automobile service station located on the north side of 79th Street between Kenwood and Dorchester avenues in the City of Chicago. A building on the north end of the premises housed an automobile accessory sales room and greasing racks. The sales room, which occupied the west half of the building, had two large show windows facing 79th Street. About eight feet south and paralleling the show windows were six or eight gasoline pumps. This lane between the pumps and the building was used by automobilists who came to purchase gasoline.

ALBERT MARIL, a minor, etc.,	action from
appellant,	
v.	directly from
KARL, MARKX & COMPANY, a corporation,	the county.
appellee.	

NM. PROSSER JUSTICE LUND delivered the opinion of the court.

This is an action to recover damages for personal injuries sustained by plaintiff, a minor, as a result of defendant's alleged negligence in the maintenance of an automobile service station. The cause was tried by a jury. At the conclusion of plaintiff's evidence the trial court directed a verdict in favor of defendant Marx, Karnak & Company, hereinafter called "Marx." There was a verdict and judgment in plaintiff's favor for $50,000 against defendant Leibon T. Mead, which was subsequently reduced and on plaintiff's motion defendant Mead was dismissed from the cause. Plaintiff/Appellant appeals.

On oral argument before this court plaintiff, counsel stated that a settlement was made of the judgment against defendant Mead.

The essential facts are uncontroverted. On Sept. 5, 1950 defendant Marx operated an automobile service station located on the north side of 7th Street between Lenwood and Longbeater avenues in the City of Oakmere. A building on the south end of the premises housed an automobile accessory sales room and greasing room. The sales room, which occupied the west half of the building, had two large show windows facing 7th Street. About eight feet south was partitioning the sales windows from six or eight grease rooms. This lane between the grease and the building was used by automobiles who came to purchase gasoline.

About seven o'clock in the evening of May 9, 1935, Frank Makiel accompanied by the plaintiff herein then less than three years of age, drove his automobile to Sears' service station for the purpose of having his car greased. At that time all the attendants were busy. After a period of waiting a uniformed attendant of Sears' directed plaintiff to drive his car upon the first greasing platform immediately east of the automobile accessory sales room. There plaintiff and his father got out of the automobile, whereupon one of Sears' attendants "hoisted up the car and started working on it." While this was being done plaintiff and his father "stood about three feet west of the wall" which separates the accessory sales room from that portion of the building containing the greasing racks. Plaintiff was standing to his father's left (west) about two or three feet, in which position they remained for about fifteen minutes. During this period automobiles came up to the south side of the gas pumps and stopped to buy gasoline. While plaintiff's father was watching an attendant greasing his automobile he heard someone say "look out." As he turned his head he saw defendant Hood's automobile turning into the lane between the pumps and the building and there strike the plaintiff. The right front wheel of defendant Hood's automobile ran on to plaintiff's right leg between the hip and the knee, causing the injuries complained of.

The evidence shows that on many occasions for a period of nine years preceding the occurrence plaintiff's father had had his automobile greased at defendant Sears' service station; that defendant Hood had also been at the Sears station frequently to buy gasoline and to get her car greased; and that she was familiar with the driveway on these premises and the location of the pumps and the greasing station. On the day of the occurrence she entered the driveway from 79th Street intending to "go in between the gas pumps and the little building that is there." As she was going

About seven o'clock in the evening of May 9, 1950, Frank Baldi accompanied by the plaintiff herein then less than three years of age, drove his automobile to Beers' service station for the purpose of having his car greased. At that time all the attendants were busy. After a period of waiting a uniformed attendant of Beers' directed plaintiff to drive his car from the first greasing platform immediately east of the automobile accessory sales room. There plaintiff and his father got out of the automobile, whereupon one of Beers' attendants "helped us the car and started working on it." While this was being done plaintiff and his father "stood about three feet west of the wall" which separates the accessory sales room from that portion of the building containing the greasing racks. Plaintiff was standing to his father's left (west) about two or three feet, in which position they remained for about fifteen minutes. During this period automobiles came in to the south side of the gas pumps and stopped to buy gasoline. While plaintiff's father was watching an attendant greasing his automobile he heard someone say "look out." As he turned his head he saw defendant Hood's automobile turning into the line between the pumps and the building and there struck the plaintiff. The right front wheel of defendant Hood's automobile ran on to plaintiff's right leg between the hip and the knee, causing the injuries complained of.

The evidence shows that on many occasions for a period of nine years preceding the occurrence plaintiff's father had had his automobile greased at defendant Beers' service station; that defendant Hood had also been at the Beers station frequently to buy gasoline and to get his car greased; and that he was familiar with the driveway on these premises and the location of the pumps and the greasing stations. On the day of the occurrence he entered the driveway from 78th Street intending to "go in between the gas pumps and the little building that is there." As he was going

around the pump she heard a shout and immediately stopped her car. She did not see the plaintiff nor did she know that her right front fender struck him and knocked him down.

Plaintiff contends that defendant is guilty of negligence in the maintenance of its automobile service station. In their brief plaintiff's counsel say that "from the construction of the driveway and the location of the show window and pumps any reasonable-minded person could foresee that the narrow aisle between the pumps and the show window was not only dangerous to persons invited to look into the show room but was most certain to cause injury to any person looking into the window. The condition of said aisle was so maintained that it was a dangerous trap."

Sears maintains that the proximate cause of plaintiff's injury was not the condition of the premises but the act of a third party, defendant Hood.

In Briske v. Village of Burnham, 379 Ill. 193, 199, the court said:

"If a negligent act or omission does nothing more than furnish a condition making an injury possible, and such condition, by the subsequent independent act of a third person, causes an injury, the two acts are not concurrent and the existence of the condition is not the proximate cause of the injury. (Storen v. City of Chicago, 373 Ill. 530; Illinois Central Railroad Co. v. Oswald, 338 id. 270; Hartnett v. Boston Store of Chicago, 265 id. 331; Seith v. Commonwealth Electric Co. 241 id. 252.) An intervening efficient cause is a new and independent force which breaks the causal connection between the original wrong and the injury and itself becomes a direct and immediate cause of the injury. (Illinois Central Railroad Co. v. Oswald, supra; Seith v. Commonwealth Electric Co., supra.) The cause of an injury is that which actually produces it, while the occasion is that which provides an opportunity for the causal agencies to act."

In the instant case the only occurrence witnesses for plaintiff were plaintiff's father, and defendant Helen Hood who was called by plaintiff under section 60 of the Civil Practice Act. Plaintiff's father testified that at the service station a Sears' attendant directed him where to drive in and that the following conversation took place: "'We want to stay in the car.' 'No,' he says, 'you can't stay in the car,' and I says, 'O.K.,' so I opened

around the room she heard a shout and immediately received her eye. She did not see the plaintiff nor did she know that he right from Fowler attack him and knocked him down.

Plaintiff contends that defendant is guilty of negligence in the maintenance of its automobile service station. In their brief plaintiff's counsel say that "upon the construction of the driveway and the location of the show window and upon any reasonable-minded person could foresee that the narrow aisle between the pumps and the show window was not only dangerous to persons invited to look into the show room but was most certain to cause injury to any person looking into the window. The condition or rail alone was so maintained that it was a dangerous trap."

There maintains that the proximate cause of plaintiff's injury was not the condition of the premises but the act of a third party, defendant Hood.

In Inlaze v. Village of Downers, 277 Ill. 143, 148, the court said:

> "If a negligent act or omission does intervene more than furnish a condition making an injury possible, and such condition, by the subsequent independent act of a third person, causes an injury, the two acts are not concurrent and the existence of the condition is not the proximate cause of the injury. (Stamm v. City of Chicago, 279 Ill. 290; Illinois Central Railroad Co. v. Grund, 62 id. 239; Barnes v. Chicago Terminal Transfer Co., 220 id. 31; Smith v. Commonwealth Edison Co., 301 id. 448.) An intervening efficient cause is a new and independent force which breaks the causal connection between the original wrong and the injury and itself becomes a direct and immediate cause of the injury. (Illinois Central Railroad Co. v. Smith, 176 id. 332; Commonwealth Electric Co. v. Spence.) The cause of an injury is that which actually produces it, while the occasion is that which provides an opportunity for the causal agencies to act."

In the instant case the only eyewitnesses to the accident were plaintiff's father, and defendant Hoyle Hood who was called by plaintiff under section 60 of the Civil Practice Act. Plaintiff's father testified that at the service station a Texaco attendant directed his wife to drive in and that the following conversation took place: "I'm going to stay in the car." "No," he says, "you don't stay in the car," and I say, "O.K." so I opened

the door and walked out of the car, and he hoisted up the car and started working on it, and I was standing in back of the car and watching it."

Defendant Hood testified, "When I was half-way around this pump the front of my car was half-way past the pump, my right front fender was several feet from this little building north of me." From this testimony it is obvious that while the plaintiff's father was watching his car being greased plaintiff wandered away several feet into the path of defendant Hood's automobile as she was driving to the gasoline pumps.

We are cognizant of the rule that on a motion for a directed verdict for a defendant the question of law to be determined by the court is whether there was any evidence, taken in its aspect most favorable to the plaintiff, to sustain the cause of action, and that negligence and contributory negligence are usually questions of fact to be determined by the jury. In the present case, however, we are of the opinion from a careful examination of plaintiff's evidence that there is no evidence which tends to show that defendant Sears was guilty of any negligence which proximately caused plaintiff's injuries.

On the day of the occurrence defendant Hood's view was unobstructed as she drove into the inner lane between the pumps and the building but she failed to see the plaintiff. That there was ample space for the passage of her automobile is borne out by her own testimony. The lane or "aisle" had been in constant use for many years. So far as the record shows there was no evidence tending to prove that construction of the driveway and the location of the show window and pumps constituted a "dangerous trap."

We have considered the other points urged and the authorities cited in support thereof, but in the view we take of this case we deem it unnecessary to discuss them.

For the reasons stated, the judgment is affirmed.

JUDGMENT AFFIRMED.

KILEY AND BURKE, JJ. CONCUR.

the door and walked out of the car, and he helped up the car and started working on it, and I was standing in back of the car and watching it."

Defendant Hood testified, "When I was half-way around this side the front of my car was half-way past the door, my right front fender was several feet from this little building north of me."

From this testimony it is obvious that while the plaintiff's father was watching his car being pressed plaintiff wandered away several feet into the path of defendant Hood's automobile as she was driving to the repair shop.

We are cognizant of the rule that on a motion for a directed verdict for a defendant the question of law is to be determined by the court is whether there was any evidence, taken in its aspect most favorable to the plaintiff, to sustain the cause of action, and that negligence and contributory negligence are usually questions of fact to be determined by the jury. In the present case, however, we are of the opinion from a careful examination of plaintiff's evidence that there is no evidence which tends to show that defendant Hood was guilty of any negligence which proximately caused plaintiff's injuries.

On the day of the occurrence defendant Hood's view was unobstructed as she drove into the lower lane between the house and the building but she failed to see the plaintiff. That there was ample space for the passage of her automobile is borne out by her own testimony. The lane or "alale" has been in constant use for many years. So far as the record shows there was no evidence tending to prove that construction of the driveway and the location of its show window and pumps constituted a "dangerous trap."

We have considered the other points urged and the authorities cited in support thereof, but in the view we take of this case we deem it unnecessary to discuss them.

For the reasons stated, the judgment is affirmed.

JUDGMENT AFFIRMED.

KELLY AND MOORE, JJ., CONCUR.

43725

CHARLES M. PALMER, Appellee,	)	APPEAL FROM
v.	)	CIRCUIT COURT
FRANK X. MAYER, Appellant.	)	COOK COUNTY.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

In an amended complaint filed in the Circuit Court of Cook County, Charles M. Palmer sought damages of $6,675.20 from Frank X. Mayer for breach of a written agreement. An answer and a counterclaim were filed by the defendant and a reply was filed by plaintiff. In a trial before the court and a jury a verdict was returned finding the issues for plaintiff and assessing his damages at $6,675.20. Motions by defendant for a directed verdict and for judgment notwithstanding the verdict were overruled. While the court had under consideration a motion for a new trial, the defendant agreed to a remittitur of $3337.60, one half of the judgment, and judgment was entered accordingly. Defendant appealed.

Plaintiff alleged that on October 12, 1943 at Chicago, the parties entered into an agreement wherein plaintiff promised to sell to defendant 100 shares of the capital stock of the Superior Beverage Co., Inc., a corporation, for a certain named consideration, including a share or return of the future business, based upon the amount of sugar available to the corporation under the quota issued or authorized by the Office of Price Administration, at a sum equal to $6.00 per 100 pound bag of sugar, which the corporation at any time thereafter should be entitled to;

45725

CHARLES A. PALMER, Appellee,	APPEAL FROM
v.	MUNICIPAL COURT
FRANK X. MAYER, Appellant.	COOK COUNTY.

MR. JUSTICE SCHAFER DELIVERED THE OPINION OF THE COURT.

In an amended complaint filed in the Circuit Court of Cook County, Charles A. Palmer sought damages of $6,272.20 from Frank X. Mayer for breach of a written agreement. An answer and a counterclaim were filed by the defendant and a reply was filed by plaintiff. In a trial before the court and a jury a verdict was returned finding the issues for plaintiff and assessing his damages at $6,272.20. Motions by defendant for a directed verdict and for judgment notwithstanding the verdict were overruled. While the court had under consideration a motion for a new trial, the defendant agreed to a remittitur of $3737.50, one half of the judgment, and judgment was entered accordingly. Defendant appealed.

Plaintiff alleged that on October 16, 1947 at Chicago, the parties entered into an agreement wherein plaintiff promised to sell to defendant 100 shares of the capital stock of the Superior Beverage Co., Inc., a corporation, for a certain agreed consideration, including a share or option of the future business, based upon the amount of sugar available to the corporation under the quota issued or authorized by the Office of Price Administration, at a sum equal to $8.00 per 100 pound bag of sugar, which the corporation at any time thereafter should be entitled to;

that about September 29, 1943, prior to the execution of the agreement, defendant caused to be drawn and executed a special application addressed to the Office of Price Administration, on a form issued by that office, for the purpose of securing the consent and authorization of that office to the transfer and to the transfer of the sugar purchase certificates to the business premises of defendant, which application was signed by both on September 29, 1943, submitted to the Office of Price Administration, and by that office approved; that thereafter the sugar certificate for the period following the execution of the agreement was issued to the corporation at the business premises of defendant by the local Price Administration office in which the business of defendant was located; that plaintiff on October 12, 1943 assigned, transferred and delivered to defendant the 100 shares of capital stock, the minute book and the seal, and plaintiff duly performed all of the terms of the agreement by him to be performed; that defendant failed to perform the agreement in that (a) there was available to the corporation for the months of November and December, 1943, under its quota, 17,820 pounds of sugar, or 178 and one-fifth 100 pound bags of sugar; that there was due to plaintiff for this period the sum of $1,069.20; that there was available to the corporation for the months of January, February and March, 1944, under its quota, 17,120 pounds of sugar, or 171 and one-fifth 100 pound bags of sugar; that there was due to plaintiff under the terms of the agreement for this period the sum of $1,027.20; that there was available to the corporation for the months of April, May and June, 1944, under its quota, 23,600 pounds of sugar, or 236 100 pound bags of sugar; that there was due to plaintiff from defendant for this period the sum of $1,416; that there was due for the months of July, August and September, 1944 the sum of $1,867.20 for 311

that about September 28, 1943, prior to the execution of the agreement, defendant caused to be issued and executed a special application addressed to the Office of Price Administration, on a form issued by that office, for the purpose of securing the consent and authorization of that office to the transfer and to the transfer of the sugar purchase certificates to the business premises of defendant, which application was signed by both on September 28, 1943, submitted to the Office of Price Administration, and by that office approved; that thereafter the sugar certificate for the period following the execution of the agreement was issued to the corporation at the business premises of defendant by the Local Price Administration office in which the business of defendant was located; that plaintiff on October 12, 1943 delivered, transferred and delivered to defendant the 1[illegible] shares of capital stock, the minute book and the seal, and plaintiff duly performed all of the terms of the agreement by him to be performed; that defendant failed to perform the agreement in that (a) there was available to the corporation for the months of November and December, 1943, under its quota, 17,320 pounds of sugar, or 172 and one-fifth 100 pound bags of sugar; that there was due to plaintiff for this period the sum of $1,080.30; that there was available to the corporation for the months of January, February and March, 1944, under its quota, 17,120 pounds of sugar, or 171 and one-fifth 100 pound bags of sugar; that there was due to plaintiff under the terms of the agreement for this period the sum of $1,027.20; that there was available to the corporation for the months of April, May and June, 1944, under its quota, 23,600 pounds of sugar, or 236 100 pound bags of sugar; that there was due to plaintiff from defendant for this period the sum of $1,416; that there was due for the months of July, August and September, 1944 the sum of $1,607.20 for 211

and one-fifth 100 pound bags of sugar; that there was due to plaintiff for the months of October, November and December, 1944 for 216 100 pound bags of sugar, the sum of $1,296 - total $6,675; and that upon demand defendant failed to pay these sums.

The contract of October 12, 1943, attached to the complaint as Exhibit A, recites, in substance, as follows: that plaintiff owns all of the capital stock of the Superior Beverage Co., Inc., an Illinois corporation, being 100 shares of no par value, and all rights pertaining thereto, which he sells to defendant for $500; that as a further consideration, defendant will sell as plaintiff may direct, all of the tangible assets, - machinery, furniture, fixtures and vehicles of the company, and deliver the proceeds to the plaintiff if the sale be made within a year; that it is intended that the corporation remain in existence and continue to manufacture soft drinks and serve the same general class of customers in the same area served by it; that plaintiff will deliver on the execution of the agreement all sugar ration evidences used or unused, and upon demand execute all documents necessary to the continued use of sugar ration certificates by the corporation, it being the intention that the company will continue to be entitled to the issuance of all critical materials being rationed therefor or to be thereafter rationed; that plaintiff warrants the corporation to be free of debts and defendant agrees to keep it so and will not prejudice the right of the corporation to critical materials as set out in the Special Application to the O.P.A of September 29, 1943; and that plaintiff agrees not to prejudice the rights of the corporation to sugar ration evidences and to deliver to defendant all corporate records, minute books, stock certificate book and corporate seal; that the parties acknowledge that the amount of business a soft drink maker can do is

and one-fifth 100 pound bags of sugar; that there was due to plaintiff for the months of October, November and December, 1944 for 216 100 pound bags of sugar, the sum of $1,296 - total $6,672; and that upon demand defendant failed to pay these sums.

The contract of October 12, 1942, attached to the complaint as Exhibit A, recites, in substance, as follows: that plaintiff owns all of the capital stock of the Superior Beverage Co., Inc., an Illinois corporation, being 100 shares of no par value, and all rights pertaining thereto, which he sells to defendant for $500; that as a further consideration, defendant will sell as plaintiff may direct, all of the tangible assets, - machinery, furniture, fixtures and vehicles of the company, and deliver the proceeds to the plaintiff if the sale be made within a year; that it is intended that the corporation remain in existence and continue to manufacture soft drinks and serve the same general class of customers in the same area served by it; that plaintiff will deliver on the execution of the agreement all sugar ration evidences used or unused, and upon demand execute all documents necessary to the continued use of sugar ration certificates by the corporation, it being the intention that the company will continue to be entitled to the issuance of all critical materials using rationed therefor or to be thereafter rationed; that plaintiff warrants the corporation to be free of debts and defendant agrees to keep it so and will not prejudice the rights of the corporation to critical materials or not out in the special application to the O.P.A. of September 29, 1944; and that plaintiff agrees not to prejudice the rights of the corporation to sugar ration evidences and to deliver to defendant all corporate records, minute books, stock certificates book and corporate seal; that the parties acknowledge that the amount of business a soft drink maker can do is

limited by the amount of sugar and other critical material alloted to it and that in the bottling business a 100 pound bag of sugar makes approximately 100 gallons of finished soft drinks; that the parties agree that in addition to the $500 specified there shall be an additional consideration as a future share of the business a sum equal to $6.00 per each 100 pound bag of sugar to which the Superior Beverage Company would be entitled, and which it could get, in each rationing period, that is on the "Maximum quota obtainable" commencing November 1, 1943; that payment be made on the day the quota of the company becomes known or determinable, and if not made in 20 days, plaintiff has the right to repurchase the stock of the company and all privileges and rights appurtenant thereto. The contract directs that one half of the amount due shall be sent to plaintiff and the other one half shall be sent to one William Freeman. William Freeman was not a party to the contract or the suit. The sum of $10 is specified as the consideration for the "exclusive right to repurchase the entire stock" and all rights and privileges appurtenant, and upon default for 20 days plaintiff may make written demand and tender $10 and thereupon be entitled to repurchase, and defendant shall then endorse and deliver to plaintiff the stock, minute books, records, stock transfer books, corporate seal and all sugar certificates for ration rights and rights in other critical materials, and that defendant will have no claim to demand payment by reason of any payments theretofore made, and defendant will clear the corporation of all debts then due so as to clear the stock of all claims and demands. The contract provides that the consideration payments of $6.00 per 100 pound bag shall be made only when rationing continues by the Federal Government for the manufacture of soft drinks set out in the special O.P.A. application of September 29, 1943; that no payments are due during any temporary cessation of such rationing

limited by the amount of sugar and other critical material allotted to it and that in the bottling business a 100 pound bag of sugar makes approximately 100 gallons of finished soft drinks; that the parties agree that in addition to the 1000 specified there shall be an additional consideration in a future share of the business a sum equal to $6.00 per each 100 pound bag of sugar to which the "superior beverage company would be entitled, and which it could get, in each rationing period, that is on the "maximum quota obtainable" commencing November 1, 1942; that payment be made on the day the quota of the company becomes known or determinable, and if not made in 60 days, plaintiff has the right to repurchase the stock of the company and all privileges and rights appertaining thereto. The contract directs that one half of the amount due shall be sent to plaintiff and the other one half shall be sent to one William Freeman. William Freeman was not a party to the contract or the suit. The sum of $10 is specified as the consideration for the "exclusive right to repurchase the entire stock" and all rights and privileges appertaining, and upon default for 20 days plaintiff may make written demand and tender $10 and thereupon be entitled to repurchase, and defendant shall then endorse and deliver to plaintiff the stock, minute books, records, stock transfer books, corporate seal and all super certificates for ration rights and rights in other critical materials, and that defendant will have no claim to demand payment by reason of any payments theretofore made, and defendant will clear the corporation of all debts then due so as to clear the stock of all claims and encumbrances. The contract provides that the consideration payments of $4.00 per 100 pound bag shall be made only when rationing continues by the federal government for the manufacture of soft drinks and not in the special O.P.A. specification of September 29, 1942; that no payments are due during any temporary suspension of such rationing

but resume again when rationing is resumed and so continue until the final termination of such rationing. The termination of rationing ends plaintiff's rights, except as to accrued obligation unpaid, and in any event the agreement ends in 25 years from its date. Plaintiff is not obliged to exercise his option to repurchase the stock, but may continue to demand performance of the contract. The death of defendant ends the contract and the executor or the administrator is to pay what is due at the time of death and convey the corporate stock and sugar rationing evidences and certificates to plaintiff within a reasonable time. The contract was signed by the parties and witnessed by David Alswang, attorney for plaintiff, and R. H. Eisendrath, then the attorney for defendant.

Also attached to the complaint is a special application to the O.P.A on their form R-315, dated September 29, 1943, signed by defendant and with a certificate by plaintiff, acting for the corporation, that the statements in the application are true. The application is in the name of the corporation, address, 1356 Altgeld Street, Chicago, for "transfer and permission to move establishment." The applicant is described as a "manufacturer and bottler of soft drinks." It requested the sugar quota of "173 bags per 2 mos." to continue. It stated that 95 bags were on hand. To the inquiry: "Explain fully why you need this food item, or why you request the action in 3(b)", applicant answered: "Frank X. Mayer, sole proprietor of Sunset Valley Orange Co., not inc., is a manufacturer and bottler of non-carbonated soft drinks with an establishment for such purposes at 3357 N. Clifton Ave., and is presently a user of sugar ration evidences and certificates. Mr. Mayer has contracted to purchase and, upon approval of this application, will purchase the entire capital stock, equipment inventory, establishment, good will and all other assets of Superior Beverage Co., Inc., now located at

but resume again when rationing is removed and so continue until the final termination of such rationing. The termination of rationing ends plaintiff's rights, except as to accrued obligation unpaid, and in any event the agreement ends in 25 years from its date. Plaintiff is not obliged to exercise his option to repurchase the stock, but may continue to demand performance of the contract. The death of defendant ends the contract and the executor or the admin-istrator is to pay what is due at the time of death and convey the corporate stock and sugar rationing evidences and certificates to plaintiff within a reasonable time. The contract was signed by the parties and witnessed by David Alexander, attorney for plaintiff, and G. H. Eisenbrath, then the attorney for defendant.

Also attached to the complaint is a special application to the O.P.A on their form R-315, dated September 6, 1943, signed by defendant and with a certificate by plaintiff, acting for the corporation, that the statements in the application are true. The application is in the name of the corporation, address, 1500 Altgeld Street, Chicago, for "transfer and consideration to move establishment." The applicant is described as a "manufacturer and bottler of soft drinks." It requested the sugar quota of "175 bags per 2 mos." to continue. It stated that 95 bags were on hand. To the inquiry: "Explain fully why you need this food item, or why you request the action in 3(b)", applicant answered: "Frank X. Sayer, sole proprietor of Sunset Valley Orange Co., not Inc., is a manufacturer and bottler of non-carbonated soft drinks with an establishment for such purposes at 1327 N. Clifton Ave., and is presently a user of sugar ration evidences and certificates. Mr. Sayer has contracted to purchase and, upon approval of this application, will purchase the entire capital stock, equipment inventory, establishment, good will and all other assets of Superior Beverage Co., Inc., now located at

1356 Altgeld St. Upon acquisition of Superior Beverage Co., Inc., as aforesaid, Mr. Mayer proposes to sell and dispose of a part of the equipment of Superior Beverage Co., Inc., and move the establishment of Superior Beverage Co., Inc., to the premises of Sunset Valley Orange Co., not inc., that is 3357 N. Clifton Ave. This is an application for the transfer and use of the present sugar inventory, present and future sugar ration evidences and certificates of Superior Beverage Co., Inc., to Frank X. Mayer. Mr. Mayer will continue the business of Superior Beverage Co., Inc., at the plant and establishment of Sunset Valley Orange Co., not inc., at 3357 N. Clifton Avenue, using in whole or in part the equipment of Sunset Valley Orange Co., not inc. The identity of Superior Beverage Co., Inc., will continue insofar as the use of sugar ration evidences and certificates and other ration commodities are concerned, and the sugar allotted to Superior Beverage Co., Inc., will be used in the manufacture of bottled soft drinks under the label, brand and trade names as Frank X. Mayer shall designate. The products will serve the same class of customers and in substantially the same geographical territory as are now being served by Superior Beverage Co., Inc., at their present address. It is not intended to merge or combine the sugar ration evidences or certificates of Superior Beverage Co., Inc., with those of Sunset Valley Orange Co., not inc., and Superior Beverage Co., Inc., will continue to exist and operate as a separate entity and corporation from Sunset Valley Orange Co., not inc. All addresses contained herein are located in Chicago, Illinois."

Defendant maintains that the contract sued upon is part of a fraudulent scheme to avoid and "defeat the operation of the Regulations of the Office of Price Administration" and that plaintiff "should not be permitted to profit by his own wrong." Plaintiff answers that "fraud or illegality was not an issue or defense raised under the pleadings." A perusal of the pleadings shows

1250 Aliquid St. Upon consolidation of Superior Beverage Co., Inc., as aforesaid, Mr. Sager proposes to sell and dispose of a part of the system equipment of Superior Beverage Co., Inc., and open the establishment of Superior Beverage Co., Inc., in the premises of Tunnel Valley Bevrage Co., not Inc., that is 3007 S. Clifton Ave. This is an application for the transfer and use of the present liquor inventory, permit and future liquor retail wholesale and certificates of Superior Beverage Co., Inc., to Frank S. Sager. Mr. Sager will continue the business of Superior Beverage Co., Inc., at the place and establishment of Tunnel Valley Bevrage Co., not Inc., at 3007 S. Clifton Avenue, being in order to in part the equipment of Tunnel Valley Bevrage Co., not Inc. The inventory of Superior Beverage Co., Inc., will continue insofar as the use of liquor retail wholesale and certificates and other retail commodities are concerned, and the liquor allotted to Superior Beverage Co., Inc., will be used in the manufacture of bottled soft drinks under the label, brand and trade name of Frank S. Sager soft drinks. The products will serve the same class of customers and in substantially the same geographical territory as are now being served by Superior Beverage Co., Inc., at their present address. It is not intended to merge or combine the liquor retail wholesale or certificates of Superior Beverage Co., Inc., with those of Tunnel Valley Bevrage Co., not Inc., and Superior Beverage Co., Inc., will continue as valid and operate as a separate entity and corporation from Tunnel Valley Bevrage Co., not Inc. All addresses contained herein are located in Chicago, Illinois."

Defendant maintains that the contract sued upon is not of a fraudulent nature in which case "defeat the creditors of the Corporation of the Office of Price Administration" and that plaintiff "should not be permitted to profit by its own wrong." Plaintiff answers that "fraud or illegality was not an issue in Bayshore Inland under the circumstances." A perusal of the Bayshore cases

that defendant, in his answer, averred the illegality of the transaction. Plaintiff recognized this in his reply, wherein he stated that he denied that "the agreement was contrary to the rationing laws of the United States of America", and denied that it was illegal. Plaintiff also asserted that the O.P.A., upon application of the parties, approved the transfer. Furthermore, the transcript shows that in the trial the parties understood that the illegality of the transaction was an issue. The court also gave to the jury, at the request of defendant, instructions that under the law plaintiff could not "recover on a contract entered into contrary to the laws of the United States of America" and that if the jury found from the evidence that the agreement of October 12, 1943 was contrary to the laws of the United States of America, plaintiff could not recover. The attorneys for the respective parties also read to the court and jury excerpts from the Regulations and interpretative bulletins issued by the O.P.A., and in the trial court and here base their respective arguments as to the validity and invalidity of the transaction on these excerpts. From all this it is apparent that both parties understood that the chief contention in the trial was as to whether the parties entered into an illegal transaction.

Where it appears that the contract sought to be enforced is against public policy, its validity is not waived by failure to plead it, and such a defense may be urged for the first time in a reviewing court. Berge v. Berge, 366 Ill. 228; Vock v. Vock, 365 Ill. 432; Messick v. Brokaw & Co., 310 Ill. App. 126. No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out; nor can he set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim. The law will not aid either party to an illegal agreement. It leaves them where it finds them. While it may not always seem an honorable thing to do,

that defendant, in his answer, asserted the illegality of the transaction. Plaintiff recognizes this in his reply, wherein he stated that he denied that "the agreement was contrary to the criminal laws of the United States of America", and stated that it was illegal. Plaintiff also asserted that the C.F.A., upon application of the parties, accepted the transfer. Furthermore, the treasurer claims that in the trial the parties endeavored that the illegality of the transaction was an issue. The court also gave to the jury, at the request of defendant, instructions that unless the jury plaintiff could not "recover on a contract entered into contrary to the laws of the United States of America" and that if the jury found from the evidence that the agreement of October 15, 1948 was contrary to the laws of the United States of America, plaintiff could not recover. The attorneys for the respective parties also read to the court and jury excerpts from the Regulations and Interpretative bulletins issued by the C.F.A., and in the trial court and here made their respective arguments as to the validity and invalidity of the transaction on these excerpts. From all this it is apparent that both parties contemplated that the entire contention in the trial was as to whether the parties entered into an illegal transaction.

Where it appears that the contract ought to be enforced in contact public policy, its validity is not saved by failure to plead it, and such a defense may be raised for the first time in a reviewing court. Pierce v. Pierce, 205 Ill. 598; Ryan v. Ryan, 255 Ill. 459; Keeling v. Keeling & Co., 249 Ill. 400, 1911. The principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have the illegal objects carried out; nor can he set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim. The law will not aid either party in an illegal agreement. It leaves them where it finds them. While it may not always seem on humanitis lying to do,

a party to an illegal agreement is permitted to set up the illegality as a defense, even though he may be alleging his own turpitude. In some cases relief will be afforded where the parties are not equally at fault, as where the party asking to be relieved was induced to enter into the agreement by means of fraud, duress or undue influence of the other. It is generally held that if there is a repudiation before an illegal contract is executed, the money paid may be reclaimed, for there is a locus poenitentiae. There are other exceptions to the general rule. See 17 C. J. S. Secs. 272 to 278. The rule which forbids the introduction of parol evidence to contradict, to add to, or vary a written instrument does not extend to evidence offered to show that the contract was made in furtherance of objects forbidden by statute, by the common law, or by the general policy of the law; and this is true even though the writing expressly provides that nothing but itself shall be considered. This rule is a necessary one, for otherwise the most nefarious transactions might be protected by written instruments on the face of which no vice is apparent. In accordance with this rule parol evidence is admissible to show that, although the writing evidencing a transaction is legal on its face, the real transaction is tainted with usury; or that a contract valid on its face was intended, not as a commercial transaction, but as a mere wager on the future state of the market. However, a mere intention to violate the law in connection with matters covered by the writing cannot be shown by parol, where there is no taint of illegality in the contract actually made, nor is it permissible, under such circumstances, to show a violation of law in carrying out the contract. 32 C. J. S., Evidence, Sec. 983. Morrissey v. Morrissey, 299 Ill. App., 19 N. E. (2d) 835.

a party to an illegal agreement is permitted to set up the illegality as a defense, even though he may be alleging his own turpitude. In some cases relief will be afforded where the parties are not equally at fault, as where the party seeking to be relieved was induced to enter into the agreement by means of fraud, duress or undue influence of the other. It is generally held that if there is a repudiation before an illegal contract is executed, the money paid may be recovered, for there is a locus poenitentiae. There are other exceptions to the general rule. See 17 C. J. S. Pages. 272 to 276. The rule which forbids the introduction of parol evidence to contradict, to add to, or vary a written instrument does not extend to evidence offered to show that the contract was made in furtherance of objects forbidden by statute, by the common law, or by the general policy of the law; and this is true even though the writing expressly provides that nothing but itself shall be considered. This rule is a necessary one, for otherwise the most nefarious transactions might be protected by written instruments on the face of which no vice is apparent. In accordance with this rule parol evidence is admissible to show that, although the writing evidencing a transaction is legal on its face, the real transaction is tainted with usury; or that a contract valid on its face was intended, not as a commercial transaction, but as a mere wager on the future state of the market. However, a mere intention to violate the law in connection with matters covered by the writing cannot be shown by parol, where there is no taint of illegality in the contract actually made, nor is it permissible, under such circumstances, to show a violation of law in carrying out the contract. 32 C. J. S., Evidence, Sec. 985. Morrissey v. Morrissey, 299 Ill. App., 19 N. E. (2d) 836.

The issue presented to the jury was whether the transaction was illegal in that it violated the Emergency Price Control Act and the Regulations issued thereunder. Defendant's counterclaim for the return of the $500 paid has been abandoned. The Emergency Price Control Act of 1942 declares that in the interest of national defense and security and the effective prosecution of the war, the purposes of the act are to stabilize prices and to prevent speculative, unwarranted and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation and speculation and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency. The act provides that it will be unlawful, regardless of any contract, agreement, lease or other obligation theretofore or thereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business, to buy or receive any commodity, or to demand or receive any rent for any defense area housing accommodations, or otherwise to do or to omit to do any act, in violation of any regulation or order under the act, or of any price schedule effective in accordance with the provisions of the act, or to offer, solicit, attempt or agree to do any of the "foregoing." The act created the Office of Price Administration under the direction of an administrator. The act provides for its enforcement and for penalties for its violation.

During the trial the attorney for defendant read to the jury what he described as "paragraph 1407.144" of the O.P.A regulations as follows:

"Transfer of establishment. If an entire establishment including the good-will, is transferred to a person, the sugar inventory of the establishment may be transferred to such person without the surrender of certificates or stamps. * * * An establishment acquired by transfer, which is continued in substantially the same manner as prior to the transfer, shall be entitled to receive certificates at the time of registration and thereafter, and to take deliveries of sugar to the same extent as prior to the transfer. All certificates and stamps held by the establishment

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During the trial the attorney for defendant read to the jury what be described as "paragraph 1407.144" of the O.P.A. regulations as follows:

"Transfer of establishment. If an entire establishment including the good-will, is transferred to a person, the buyer inventory of the establishment may be transferred to such person without the surrender of certificates or stamps. * * * An establishment acquired by transfer, which is continued in substantially the same manner as prior to the transfer, shall be entitled to receive certificates at the time of registration and thereafter, and to take deliveries of sugar to the same extent as prior to the transfer. All certificates and stamps held by the establishment

at the time of transfer shall be surrendered by the person acquiring the establishment, to the Board having jurisdiction over the establishment. At the time of such surrender, if the establishment is being continued, such person may apply for replacement certificates authorizing deliveries of an amount of sugar equal to that authorized by the surrendered certificates and stamps. The application therefor shall be made to the Board on O.P.A. Form No. R 315 by such person or his authorized agent. Replacement certificates shall be issued, after transfer, only if the establishment is to be continued in substantially the same form."

The attorney for plaintiff read to the jury what he described as "Sec. 1407.144B of a bulletin issued by the O.P.A., with reference to transfer establishments and the use by industrial users of sugar," as follows:

"As long as the good-will of the seller of a transfer establishment is actually purchased, it is not material that the purchaser chooses not to exploit the advantages of the seller's name, trade-names and trade marks. * * * Production of different bottled beverages by transfer establishment. A beverage company-as transferee of the establishment of another beverage company, may comply with the requirements of Section 1407-144B, even though it uses the sugar alloted on the basis originally established by the latter company for the production of its own beverage, having a different formula and trades name. * * * Replacement certificates may be issued to a transfer establishment pursuant to Section 1407-144B only after the transferee has registered the establishment and has made the following statements on O.P.A. form R 315 under Section 1407-144B and then only if the Board is satisfied as to their truth: (1) That the establishment, including equipment, good-will, sugar inventory and sugar ration evidences on hand, have been acquired by the transferee; (2) that the transfer establishment will continue to serve the same general class of customers in the same area served by it before the transfer; (3) that the establishment will continue to produce the same product or products, although not necessarily under the same trade-name; (4) Requirement: that the equipment of a transferred establishment be continued in use after the transfer has been revoked although representations concerning the requirements (2) and (3), stated above, need not be repeated on subsequent application for sugar purchase certificates. The transfer establishment shall be entitled to receive certificates and make delivery of sugar to the same extent as the establishment might have done prior to the transfer, only as long as the Board is satisfied that the transfer establishment is continuing to make such commodities. The term 'equipment', as used herein means the essential sugar using equipment of the business."

In order to determine whether the transaction was illegal, we look to the substance rather than the form. It will, therefore, be necessary to discuss the circumstances surrounding the transaction.

at the time of transfer shall be surrendered by the owner terminating the establishment, to the Board having jurisdiction over the establishment. At the time of such surrender, if the establishment is being continued, such person may apply for permanent certificates authorizing holdovers of an amount of liquor equal to that authorized by the surrendered certificates and stamps. The application thereof shall be made to the Board on U.S.P. Form 3. It shall by such person or his authorized agent. Replacement certificates shall be issued, after transfer, only if the establishment is to be continued in substantially the same form."

The attorney for plaintiff read to the jury what he described as "Sec. 1407.1442 of a bulletin issued by the U.S.P., which relates to transfer establishments and the use of industrial users of liquor," as follows:

"As long as the good-will of the seller of a terminated establishment is actually purchased, it is not material that the purchaser chooses not to exploit the advantages of the seller's name, trade-name and trade marks. * * * Dealerships of distinctive bottled beverages by transfer establishment. A beverage manufacturer of the establishment of another beverage company, may comply with the requirements of section 1407-1442, even though it uses the liquor allotted on the basis originally established by the latter company for the production of its own beverage, having a different formula and trade-name. * * * Distillers certificates may be issued to a transfer establishment pursuant to section 1407-1442 only after the transferee has qualified the establishment and has made the following statements to U.S.P. Form 3.10 under section 1407-1442 and then only if the board is satisfied as to their truth: (1) That the establishment, including equipment, good-will, liquor inventory and liquor allowance on hand, have been acquired by the transferee; (2) that the transfer establishment will continue to serve the same general class of customers in the same area served by it before the transfer; (3) that the establishment will continue to produce the same product or products, although not necessarily under the same trademarks; (4) Requirements that the equipment of a transferred establishment be continued in use after the transfer has been revoked although representations concerning the requirements (2) and (3), stated above, need not be repeated on subsequent application for liquor purchase certificates. The transfer establishment shall be entitled to receive certificates and make delivery of liquor in the same extent as the establishment might have done prior to the transfer, only as long as the board is satisfied that the transfer establishment is continuing to make such commitments. The term 'equipment', as used herein means the essential liquor using equipment of the business."

In order to determine whether the transaction was illegal, we look to the substance rather than the form. It will, therefore, be necessary to discuss the circumstances surrounding the transaction.

Plaintiff entered the soft drink bottling business in 1937 under the name of Paddock Club Beverage Company, in which he was a partner with Earl Pierce. On April 21, 1941 a certificate of incorporation was issued by the Secretary of State to the Superior Beverage Co., Inc., with 100 shares of no par value capital stock to be issued for $1,000. Plaintiff Palmer, Earl Pierce and a man named Stephen Peters were the incorporators. The corporation was to manufacture and sell soft drinks. It took over the assets of the Paddock Club Beverage Company and continued with the business at the same address, 1356 Altgeld Street, Chicago, without the addition of any new equipment. Plaintiff was president and treasurer and owned all of the capital stock. The corporation manufactured carbonated soft drinks. Defendant had been a manufacturer of fruit juices and syrups since 1935 and has been manufacturing soft drinks of all kinds. In September, 1943 he was in the business of manufacturing soft drinks under the name of Sunset Valley Orange Co., not inc., at 3557 North Clifton Avenue, and had been for about five years. His product was distributed all over Chicago from that address. He had a sugar quota. He did not manufacture carbonated drinks. The respective places of business were a little more than a mile apart. They were under the jurisdiction of different O.P.A. local rationing boards. Plaintiff and defendant had known one another for several years, but had had no business together. Prior to going into the soft drink business, defendant had been in the investment business for two years, and had been employed by the Trustees System for about 15 months.

There was a conflict in the testimony as to whether defendant approached plaintiff, or plaintiff approached defendant. Plaintiff testified that he wanted to go out of business and that his first conversation with defendant was at the corporation's

Plaintiff entered the soft drink bottling business in 1937 under the name of Paddock Club Beverage Company, in which he was a partner with Earl Pierce. On April 21, 1941 a certificate of incorporation was issued by the Secretary of State to the Superior Beverage Co., Inc., with 100 shares of no par value capital stock to be issued for $1,000. Plaintiff Palmer, Earl Pierce and a man named Stoman Peters were the incorporators. The corporation was to manufacture and sell soft drinks. It took over the assets of the Paddock Club Beverage Company and continued with the business at the same address, 1556 Altgeld Street, Chicago, without the addition of any new equipment. Plaintiff was president and treasurer and owned all of the capital stock. The corporation manufactured carbonated soft drinks. Defendant had been a manufacturer of fruit juices and syrups since 1938 and has been manufacturing soft drinks of all kinds. In September, 1942 he was in the business of manufacturing soft drinks under the name of Sunset Valley Orange Co., not Inc., at 2247 North Clifton Avenue, and had been for about five years. His product was distributed all over Chicago from that address. He had a sugar quota. He did not manufacture carbonated drinks. The respective places of business were a little more than a mile apart. They were under the jurisdiction of different O.P.A. local rationing boards. Plaintiff and defendant had known one another for several years, but had had no business together. Prior to going into the soft drink business, defendant had been in the investment business for two years, and had been employed by the Pullman Company for about 18 months.

There was a conflict in the testimony as to whether defendant approached plaintiff, or plaintiff approached defendant. Plaintiff testified that he wanted to go out of business and that his first conversation with defendant was at the corporation's

plant on Altgeld Street about the middle of August, 1943. The parties stipulated that the rationing of sugar went into effect on April 21, 1942. In 1943 the ration coupons were issued for two month periods. Thus, there was an allowance to the corporation for the two months of September and October and for the two months of November and December. In 1944 the rationing was for periods of three months. Plaintiff testified that he told defendant he wanted $11,500 for the business and that defendant proposed to buy on a plan that contemplated the amount of business that should be done with the amount of materials he could get; that defendant estimated that a 100 pound bag of sugar would make 100 gallons of finished pop in 33 cases and offered 15¢ per case, to which plaintiff would not agree; that then defendant raised it to 20¢ per case; that there was further discussion; that plaintiff suggested 30 cases at 20¢ per case, or $6.00 per 100 pound bag of sugar; that the latter figure was agreed on; that the matter of drafting papers was left to their respective lawyers. Defendant testified that after he first spoke to plaintiff on the telephone, the latter called on him at his (defendant's) plant; that they discussed the matter generally; that at the invitation of plaintiff, defendant went over the next day and was shown around the plant; that plaintiff said that he had quit the bottling business and was selling syrups; that he wanted to make something out of his sugar quota; that plaintiff showed him how he mixed and piped syrup with a rubber hose into barrels set on a truck and said he did nothing but sell the sugar or syrup; that he offered to sell defendant syrup at $1.00 per gallon; that plaintiff told him that if he did not want to buy the syrup, he could buy the sugar at double the ceiling price; that defendant said the O.P.A. would not permit a deal of that nature; that sooner or later

plant on Lifgold Street about the middle of August, 1941. The parties stipulated that the refining of sugar was into effect on April 21, 1942. In 1943 the ration coupons were issued for two month periods. Thus, there was no allowance in the apportionment for the two months of September and October and for the two months of November and December. In 1944 the rationing was for periods of three months. Plaintiff testified that he told defendant he wanted $11,000 for the business and that defendant proposed to buy on a plan that contemplated the amount of business that should be done with the amount of materials he could get; that defendant estimated that a 100 pound bag of sugar would make 100 gallons of finished goo in 32 weeks and attested 1944 per case, to which plaintiff would not agree; that then defendant raised it to $24 per case; that there was further discussion; that plaintiff suggested 30 cases at $24 per case, or $0.60 per/100 pound bag of sugar; that the latter figure was agreed on; that the matter of operating costs was left to their respective lawyers. Defendant testified that after he first spoke to plaintiff on the telephone, the latter called on him at his (defendant's) plant; that they discussed the matter generally; that at the invitation of plaintiff, defendant went over the next day and was shown around the plant; that plaintiff said that he had quit the cotting business and was selling syrup; that he wanted to make something out of his sugar supply; that plaintiff showed him he mixed and piped syrup with a rubber hose into barrels set on a truck and said he did nothing but sell the sugar or syrup; that he offered to sell defendant syrup at $1.40 per gallon; that plaintiff told him that if he did not want to buy the syrup, he could buy the sugar at double the selling price; that defendant told the O.P.A. would not permit a deal of that nature; that sooner or later

they would be found out; that plaintiff replied that his lawyer could draw a contract so as to make it look legal and deceive the O.P.A.; that in that way they could do business at $6.00 over the ceiling price, or $12 per 100 pound bag of sugar; that he, plaintiff, would get in touch with his lawyer and discuss as to how a contract could be drawn to make the transaction look legal; and that he would then let defendant know what the next step would be. Plaintiff denied that he called defendant up. He said that defendant came to him in the first instance. Plaintiff testified that defendant asked him how many customers he had; that he told him about 1,800; that he told him there were some outstanding accounts receivable; that defendant inquired about the labels; that plaintiff told him there were one million labels on hand; that the corporation had a brand known as "Superior" sold in quarts, and a cheaper product called "Piccadilly Club"; that the "Superior" brand was used since 1940 and the "Piccadilly Club" since 1937; and that in 1943 they had 1,200 customers and sold to grocery stores, liquor stores, pop stands and a few taverns. Plaintiff denied that he told defendant that on August 15, 1943 he was shut down and was making only syrup, and denied that he discussed the O.P.A with him on that date. However, on cross-examination, plaintiff testified that he "quit" his business"about the middle of August, 1943". In answer to the question: "Did you tell him on that occasion, on August 15, 1943, that you were shut down and you were only making syrup?", he answered: "No, I did not." He was then asked: "What was the fact as to what your operations were on that date?" He answered by the following inquiry: "Up to that day?" His attorney then said: "Yes." He then answered: "We had no delivery truck and we were selling flavored syrups."

Defendant testified that about September 20, 1943 plaintiff told him that he had made an appointment with his (plaintiff's) attorney at the latter's office; that in the meantime defendant arranged with his (defendant's) attorney about seeing plaintiff's attorney in

they would be found out; that plaintiff replied that his lawyer could draw a contract so as to make it look legal and deceive the O.P.A.; that in that way they could do business at $8.00 over the ceiling price, or $12 per 100 pound bag of sugar; that he, plaintiff, would get in touch with his lawyer and discuss as to how a contract could be drawn to make the transaction look legal; and that he would then let defendant know what the next step would be. Plaintiff denied that he called defendant up. He said that defendant came to him in the first instance. Plaintiff testified that defendant asked him how many customers he had; that he told him about 1,800; that he told him there were some outstanding accounts receivable; that defendant inquired about the labels; that plaintiff told him there were one million labels on hand; that the corporation had a brand known as "Superior" sold in quarts, and a cheaper product called "Pleasantly Club"; that the "Superior" brand was used since 1930 and the "Pleasantly Club" since 1937; and that in 1943 they had 1,200 customers and sold to grocery stores, liquor stores, pop stands and a few taverns. Plaintiff denied that he told defendant that on August 18, 1943 he was shut down and was making only syrup, and denied that he discussed the O.P.A with him on that date. However, on cross-examination, plaintiff testified that he "quit" his business"about the middle of August, 1943". In answer to the question: "Did you tell him on that occasion, on August 18, 1943, that you were shut down and you were only making syrup?", he answered: "No, I did not." He was then asked: "What was the fact as to what your operations were on that date?" He answered by the following inquiry: "Up to that day?" His attorney then said: "Yes." He then answered: "We had no delivery truck and we were selling flavored syrups."

Defendant testified that about September 20, 1943 plaintiff told him that he had made an appointment with his (plaintiff's) attorney at the latter's office; that in the meantime defendant arranged with his (defendant's) attorney about seeing plaintiff's attorney in

order to secure information on the nature of the deal; that on September 29, 1943 the parties met in the office of the attorney for plaintiff; that the attorney for plaintiff had worked out the details of the transaction with defendant's attorney; that the latter withdrew from his brief case the application to the O.P.A., and said he had prepared it and would handle it through the O.P.A.; that other papers were on the desk of plaintiff's attorney; that on September 29, 1943 the parties signed the application to the O.P.A, affecting the sugar rights of the corporation, a preliminary agreement between plaintiff and defendant covering the sale of the capital stock and other matters and a bill of sale from the corporation to defendant. The bill of sale executed on September 29, 1943 from the Superior Beverage Co., Inc., by plaintiff as its president to defendant, recited that for the consideration of $2,880 it conveyed and sold to defendant "all assets, equipment, good will, trade, accounts receivable, sugar inventory and all stock on hand, including specifically 240 one hundred pound bags of sugar which the corporation now has on hand"; that plaintiff "warrants that the said corporation now has on hand 240 one hundred pound bags of sugar"; that "simultaneous with the execution of this bill of sale, the parties hereto have executed and shall deliver to the Office of Price Administration special application ration food commodities number R315, dated September 29, 1943 and signed by the parties hereto for permission to move said establishment now located at 1356 Altgeld Avenue to 3357 North Clifton Avenue and to transfer sugar ration evidences and certificates for use of the Superior Beverage Company, Inc., a corporation at said new address. If said application or transfer is approved or granted within thirty days, the said Frank Mayer shall have the right to purchase all outstanding capital stock of said corporation. If said application is not acted

order to secure information on the nature of the deal; that on September 20, 1943 the parties met in the office of the attorney for plaintiff; that the attorney for plaintiff had written out the details of the transaction with defendant's attorney; that the latter withdrew from his brief case the application to the S.E.C., and said he had prepared it and would handle it through the S.E.C.; that other papers were on the desk of plaintiff's attorney; that on September 20, 1943 the parties signed the application to the S.E.C. affecting the super rights of the corporation, a preliminary agreement between plaintiff and defendant covering the sale of the capital stock and other matters and a bill of sale from the corporation to defendant. The bill of sale executed on September 20, 1943 from the Superior Beverage Co., Inc., by plaintiff as president to defendant, recited that for the consideration of $2,000 it conveyed and sold to defendant "all assets, equipment, good will, trade, accounts receivable, sugar inventory and all stock on hand, including specifically 240 one hundred sugar stamps to sugar which the corporation now has on hand"; that plaintiff "warrants that the said corporation now has on hand 240 one hundred pound bags of sugar"; that "simultaneous with the execution of this bill of sale" the parties hereto have executed and shall deliver to the office of Price Administration special application rations food commodities number M218, dated September 20, 1943 and signed by the parties hereto for permission to move said establishment now located at 1358 Atlantic Avenue to 3307 South Cliffs Avenue and to transfer sugar ration stamps and certificates for use of the successor Beverage Company, Inc., a corporation as said now exists. If said application or transfer is approved or granted within thirty days, the said Frank Meyer shall have the right to purchase all outstanding capital stock of said corporation. If said application is not acted

upon within thirty days from date hereof, or shall be rejected or not granted within thirty days hereof, the corporation shall be entitled to repurchase everything conveyed under this bill of sale at the same consideration herein expressed, minus the value of any consumable articles used during the said period."

In the preliminary agreement signed by the parties on September 29, 1943 defendant agreed to "reconvey" to the corporation all of the assets conveyed by the bill of sale, should the special application to the O.P.A be rejected or not granted. Therein the parties further agreed that in the event the application should be granted within 30 days, defendant would purchase from plaintiff all of the capital stock of the corporation, being 100 shares; that should such application be granted before the sugar quota falling due after the date of the contract was determined, defendant would pay $500, plus the proceeds of the sale of the equipment of the corporation, and plus an amount equal to $6 per "hundred pound bag of sugar available to the Superior Beverage Co. Inc., under all future quotas available for the duration of sugar rationing by the Federal Government." The agreement further provided that should the application be granted "after the quota due on the next date following the execution of this agreement shall be determined," defendant should pay $500 "plus an amount equal to $6 per one hundred pound bag of sugar available under the quota for that period, and an amount equal to $6 per one hundred pound bag of sugar available under all future quotas for the duration of sugar rationing by the Federal Government, and the proceeds of the sale of the equipment as aforementioned." The preliminary agreement concluded by stating that upon the application for transfer being granted, the parties would execute a written agreement containing "substantially the terms heretofore mentioned."

upon within thirty days from date hereof, or shall be rejected or not granted within thirty days hereof, the corporation shall be entitled to repurchase everything conveyed under this bill of sale at the same consideration herein expressed, minus the value of any consumable articles used during the said period."

In the preliminary agreement signed by the parties on September 26, 1942 defendant agreed to "recONVEY" to the corporation all of the assets conveyed by the bill of sale, should its postal application to the O.P.A be rejected or not granted. Thereby the parties further agreed that in the event the application should be granted within 30 days, defendant would reconvey free plaintiff all of the capital stock of the corporation, being 100 shares; that should such application be granted before the sugar quota falling due after the date of the contract was determined, defendant would pay $500, plus the proceeds of the sale of the equipment of the corporation, and plus an amount equal to 1¢ per "hundred pound bag of sugar available to the Superior Beverage Co. Inc., under all future quotas available for the duration of sugar rationing by the Federal Government." The agreement further provided that should the application be granted "after the quota due on the next date following the execution of this agreement shall be determined," defendant should pay $500 "plus an amount equal to 1¢ per one hundred pound bag of sugar available under the quota for that period, and an amount equal to 1¢ per one hundred pound bag of sugar available under all future quotas for the duration of sugar rationing by the Federal Government, and the proceeds of the sale of the equipment as aforementioned." The preliminary agreement concluded by stating that upon the application for transfer being granted, the parties would execute a written agreement containing "substantially the terms hereinbefore mentioned."

Plaintiff denied that his attorney stated that he had O.P.A connections, or that he was an expert in O.P.A. matters, or that he would take care of putting the application through for O.P.A. approval. Plaintiff testified that the then attorney for defendant said that he would take the contract for approval to the O.P.A; that the application form to the O.P.A. for the transfer was brought in by the attorney for defendant and entirely made out, except for the signature and date; and that there was no other discussion about O.P.A on September 29, 1943. The then attorney for defendant did not testify in the case and no explanation was given as to why he was not called by either party.

On Saturday, October 2, 1943, three days after the execution of the preliminary agreement and bill of sale, the corporation, by plaintiff as its president, wrote a letter to the Sugar Supply Corporation, 326 West Madison Street, Chicago, stating that defendant, the owner of Sunset Valley Orange Co., 3357 North Clifton Avenue, Chicago, had purchased all assets of the corporation including receivable sugar inventory, specifically 24,000 pounds of sugar, warehoused by the addressee in the name of Superior Beverage Co., Inc., 1356 West Altgeld Street, Chicago; that the transaction was authorized by a resolution of the Board of Directors and approved by the stockholders. It directed the adressee to transfer the 24,000 pounds of sugar to defendant and stated that it was directing defendant to make payment for the sugar in the amount of $1,440, less 1% discount, direct to the addressee. On the same day the corporation, by plaintiff as president, also wrote a letter to defendant authorizing and directing him to pay to the Sugar Supply Corporation $1,440, less 1%, net $1,425.60, for 24,000 pounds of sugar, "which is our present sugar inventory and warehoused by the Sugar Supply Corporation in our name." The letter stated further that in compliance with the bill of sale executed September 29, 1943, it had instructed

Plaintiff denied that his attorney stated that he had C.I.A connections, or that he was an expert in O.P.A. matters, or that he would make use of getting the application through for O.P.A. approval. Plaintiff testified that the same attorney for defendant told that he would take the contract for approval to the O.P.A; that the application form to the O.P.A. for the transfer was brought in by the attorney for defendant and entirely made out, except for the signature and date; and that there was no other discussion about C.I.A on September 23, 1945. The same attorney for defendant did not testify in the case and no explanation was given as to why he was not called by either party.

On Saturday, October 6, 1945, some days after the execution of the preliminary agreement and bill of sale, the corporation, by plaintiff as its president, wrote a letter to the super sugar Corporation, 550 West Madison Street, Chicago, stating that between the water or August Valley Omaha Co., 5527 North Milton Avenue, Chicago, had purchased all assets of the corporation including receivable sugar inventory, specifically 24,000 pounds of sugar, warehoused by the addressee in the name of Quality Beverage Co., Inc., 1500 West Allgeld Street, Chicago; that the transaction was authorized by a resolution of the board of directors and approved by the stockholders. It directed the addressee to transfer the 24,000 pounds of sugar to defendant and stated that it was directing defendant to make payment for the sugar in the amount of $1,440, less 2% discount direct to the addressee. On the same day the corporation, by plaintiff as president, also wrote a letter to defendant confirming and directing his to pay to the Super Sugar Corporation $1,440, less 2%, net $1,408.80, for 24,000 pounds of sugar, "which is our present sugar inventory and warehoused by the Super Sugar Corporation in our name." The letter stated further that in accordance with the bill of sale executed September 23, 1945, it had transferred

the Sugar Supply Corporation to transfer "our" sugar inventory of 24,000 pounds held in stock by Sugar Supply Corporation to defendant, doing business as Sunset Valley Orange Co. The letter concluded: "The payment of $1,440 is deductible from the total amount of $2,880, which leaves a balance of $1,440 to be paid directly to us." Pursuant to the agreement, bill of sale and letters, defendant on October 2, 1943 mailed his check for $1,425.60 to Sugar Supply Corporation in payment for 24,000 pounds of sugar at 6¢ per pound, less 1% discount. The check was endorsed by the drawee and paid in due course. On the same day defendant issued and delivered his check for $1,440, drawn in favor of the Superior Beverage Co., Inc., which was endorsed in the name of the corporation by plaintiff and paid on Monday, October 4, 1943.

Plaintiff testified: "I received the money on that check for $1,440 dated October 2, 1943, issued to Superior Beverage Company, signed by Frank Mayer. I received that for the Superior Beverage Company. That was in payment for the loss of time that I was closed down when we first made our agreement. It was for expenses that accrued during the time that I was closed down; and whatever else might be left from that, was to go for a part payment of the deal. There were two checks, I don't know which one was for sugar. I cannot distinguish between the two. I can't say whether that check was for sugar or not." The two checks mentioned by plaintiff were the one for $1,440 and the one for $500 mentioned in the contract of October 12, 1943. In the affidavit filed in the case in opposition to a motion by plaintiff for a summary judgment, on December 21, 1944, sworn to before a notary public in Florida, defendant stated that he "never paid $2,800 or any other sum as recited in said bill of sale." It is obvious from a reading of the record that there is no dispute that the $1,440 was paid to the plaintiff through the medium of the corporation. The affidavit merely denied that the $2,800 was paid

the Sugar Supply Corporation to transfer "our" sugar inventory of 24,000 pounds held in stock by Sugar Supply Corporation to defendant, doing business as Sunset Valley Groups Co. The letter concluded:

"The payment of $1,440 is deductible from the total amount of $2,880, which leaves a balance of $1,440 to be paid directly to us."

Pursuant to the agreement, bill of sale and letters, defendant on October 2, 1942 mailed his check for $1,425.60 to Sugar Supply Corporation in payment for 24,000 pounds of sugar at 6¢ per pound, less 1% discount. The check was endorsed by the payee and paid in due course. On the same day defendant issued and delivered his check for $1,440, drawn in favor of the Superior Beverage Co., Inc., which was endorsed in the name of the corporation by plaintiff and paid on Monday, October 4, 1942.

Plaintiff testified: "I received the money on this check for $1,440 dated October 2, 1942, issued to Superior Beverage Company, signed by Frank Bayer. I received that for the Superior Beverage Company. That was in payment for the loss of time that I was closed down when we first made our agreement. It was for expenses that accrued during the time that I was closed down; and whatever else might be left from that, was to go for a part payment of the deal. There were two checks, I don't know which one was for sugar. I cannot distinguish between the two. I can't say whether that check was for sugar or not." The two checks mentioned by plaintiff were the one for $1,440 and the one for $800 mentioned in the contract of October 12, 1942. In the affidavit filed in the case in opposition to a motion by plaintiff for a summary judgment, on December 2, 1944, sworn to before a notary public in Florida, defendant stated that he "never paid $2,800 or any other sum as mentioned in said bill of sale." It is obvious from a reading of the record that there is no dispute that the $1,440 was paid to the plaintiff through the medium of the corporation. The affidavit merely denied that the $2,800 was paid

"as recited in said bill of sale." Both parties testified that the money represented by the check for $1,440 was received and retained by plaintiff. When plaintiff's attorney interrogated defendant as to the affidavit made in Florida, he answered that he "never paid $2,800 to Mr. Palmer." Photostatic copies of the three checks are in the record. It is clear that $2,880 was not paid to plaintiff. The sum of $1,440 was paid to plaintiff through the medium of the corporation and the sum of $1,425.60 was paid to the Sugar Supply Corporation. Pursuant to the letter from the corporation, signed by plaintiff, and the checks for $1,440 to the Superior Beverage Company (and then to plaintiff), and $1,425.60 to the Sugar Supply Corporation, defendant received delivery of 24,000 pounds of sugar from the inventory of the Superior Beverage Company.

The next meeting of the parties occurred at the office of plaintiff's attorney on October 12, 1943. Plaintiff testified that Mr. Eisendrath, then the attorney for defendant, brought to the meeting a drafted agreement which he withdrew from his brief case stating: "I have secured the approval of the O.P.A and we can go ahead with the sale." After some changes in the agreement, it was signed. The purpose of the meeting was to carry into execution the terms of the preliminary contract and bill of sale made on September 29, 1943, which were conditioned upon the approval by the O.P.A of the application to transfer the sugar quota of the Superior Beverage Company. No written approval by the O.P.A. is shown in the record. The O.P.A. later issued a quota certificate dated November 1, 1943 certifying that the Superior Beverage Co., 3357 North Clifton Avenue, Chicago, was authorized to accept delivery of 15,840 pounds of sugar at a price not to exceed the maximum price established by that office.

"as recited in said bill of sale." Both parties testified that the money represented by the check for $1,440 was received and retained by plaintiff. When plaintiff's attorney interrogated defendant as to the affidavit made in Florida, he answered that he "never paid $2,800 to Mr. Palmer." Photostatic copies of the three checks are in the record. It is clear that $2,800 was not paid to plaintiff. The sum of $1,440 was paid to plaintiff through the medium of the corporation and the sum of $1,425.60 was paid to the Sugar Supply Corporation. Pursuant to the letter from the corporation, signed by plaintiff, and the checks for $1,440 to the Superior Beverage Company (and then to plaintiff), and $1,425.60 to the Sugar Supply Corporation, defendant received delivery of 24,000 pounds of sugar from the inventory of the Superior Beverage Company.

The next meeting of the parties occurred at the office of plaintiff's attorney on October 12, 1943. Plaintiff testified that Mr. Eisenbrath, then the attorney for defendant, brought to the meeting a drafted agreement which he withdrew from his brief case stating: "I have secured the approval of the O.P.A. and we can go ahead with the sale." After some changes in the agreement, it was signed. The purpose of the meeting was to carry into execution the terms of the preliminary contract and bill of sale made on September 29, 1943, which were conditioned upon the approval by the O.P.A. of the application to transfer the sugar quota of the Superior Beverage Company. No written approval by the O.P.A. is shown in the record. The O.P.A. later issued a quota certificate dated November 1, 1943 certifying that the Superior Beverage Co., 3307 North Clifton Avenue, Chicago, was authorized to accept delivery of 18,840 pounds of sugar at a price not to exceed the maximum price established by that office.

The certificate was to cover the months of November and December, 1943. The conference in Mr. Alswang's office (attorney for plaintiff) on October 12, 1943 took about five hours. Defendant testified that much of the time was taken up in deciding upon the wording of the contract so as to avoid the appearance that the $6 per bag of sugar was actually for sugar; that he wanted to take the contract to the O.P.A. for approval, but that plaintiff's attorney "outargued" his lawyer; and that at the end of the day his resistance was broken down and he decided to sign it. He testified further that he tried to read the contract through so as to understand it, but that his attention was diverted and he was unable to do so. Testimony was introduced by plaintiff that on that afternoon there was no discussion about the O.P.A. other than the statement by Mr. Eisendrath and that the discussion was concerned with the duration of the contract, which was finally fixed at 25 years, and about defendant's objection to having the contract bind his family in the event of his death. Both plaintiff and Mr. William Freeman, an employee of the corporation in 1943, denied defendant's testimony that much of the afternoon was taken up about the wording of the contract so as to avoid the appearance that the $6 per bag was actually for sugar. Plaintiff also introduced testimony controverting defendant's testimony that plaintiff's lawyer "outargued" defendant's lawyer, that defendant's attention was diverted, or that he did not understand the contract. Plaintiff turned over to defendant the corporate seal, certain record books pertaining to its organization and a certificate for 100 shares of capital stock.

After the contract was signed, plaintiff drove defendant to the latter's office, where he gave plaintiff the check for $500 called for by the contract. Defendant testified that after the office was closed for the night he sat down and read the contract;

the certificate was to cover the months of November and December, 1944. The conference in Mr. Alwang's office (attorney for plaintiff) on October 12, 1945 took about five hours. Defendant testified that much of the time was taken up in deciding upon the wording of the contract so as to avoid the appearance that the $8 per bag of sugar was actually for sugar; that he wanted to take the contract to the O.P.A. for approval, but that plaintiff's attorney "outranged" his lawyer; and that at the end of the day his resistance was broken down and he decided to sign it. He testified further that he tried to read the contract through so as to understand it, but that his attention was diverted and he was unable to do so. Testimony was introduced by plaintiff that on that afternoon there was no discussion about the O.P.A. other than the statement by Mr. Blumenstein and that the discussion was concerned with the execution of the contract, which was finally fixed at 25 years, and about defendant's objection to having the contract bind his family in the event of his death. Both plaintiff and Mr. William Freeman, an employee of the corporation in 1945, denied defendant's testimony that much of the afternoon was taken up about the wording of the contract so as to avoid the appearance that the $8 per bag was actually for sugar. Plaintiff also introduced testimony controverting defendant's testimony that plaintiff's lawyer "outranged" defendant's lawyer, that defendant's attention was diverted, or that he did not understand the contract. Plaintiff turned over to defendant the corporate seal, certain record books pertaining to its organization and a certificate for 100 shares of capital stock.

After the contract was signed, plaintiff drove defendant to the latter's office, where he gave plaintiff the check for $300 called for by the contract. Defendant testified that after the office was closed for the night he sat down and read the contract;

that the next day he called plaintiff on the telephone and told him that the contract "did not look right" to him and that he wanted to talk it over; that plaintiff came the following day; that defendant then stated to plaintiff that he felt that they "had got themselves caught in a deal that was not legal and that they might get in trouble with the O.P.A. and the Government"; that they should cancel the contract; that plaintiff should take back the stock certificate for the 100 shares; that he, plaintiff, could keep the $500 and that plaintiff said he would see his lawyer and "see" defendant in a few days. Defendant testified further that in a day or two plaintiff called on him and said that his lawyer had advised against "cancellation" or "annulling" the whole proposition; that he, defendant, pointed out some representations made to the O.P.A.; that plaintiff argued that he, defendant, could make money by converting the sugar into syrup; that defendant replied that he did not "want any of that business"; that he did not want to go on and that he would not "go through with a fake contract"; that plaintiff told him that he did not care if he lost his sugar quota and that he was going to Mexico to start a jewelry import business. Plaintiff stated that he then consulted attorney Bernard Barasa. Prior to November 1, 1943 defendant went to the O.P.A. and obtained the sugar quota certificate for November and December, 1943. On November 3, 1943 he sent it to plaintiff with a letter reading: "I am advised that it is illegal for me to use these sugar ration certificates, as your application of September 29, 1943 to the O.P.A. is based on false statements and reports. To avoid any trouble, I am willing to agree immediately to an annulment or cancellation of any and all contracts we have made, so you can make use of your sugar ration certificates without delay in the usual manner as before." Plaintiff placed the sugar ration certificate in an envelope and returned it to defendant, who took it to Mr. Barasa, who turned it over to the O.P.A. The sugar ration certificate was not used, nor were any further sugar

that the next day he called plaintiff on the telephone and told him that the contract "did not look right" to him and that he wanted to talk it over; that plaintiff came the following day; that defendant stated to plaintiff that he felt that they "had got themselves caught in a deal that was not legal and that they might get in trouble with the O.P.A. and the Government"; that they should record the contract; that plaintiff should take back the ration certificate for the 100 sheets; that he, plaintiff, could keep the 500 and that plaintiff said he would see his lawyer and "see" defendant in a few days. Defendant testified further that in a day or two plaintiff called on him and said that his lawyer had advised against "cancellation" or "cancelling" the whole proposition; that he, defendant, pointed out some representations made to the O.P.A.; that plaintiff argued that he, defendant, could make money by venturing his money into grain; that defendant replied that he did not "want any of that business"; that he did not want to go on and that he would not "go through with a face contract"; that plaintiff told him that he did not care if he lost his sugar grain and that he was going to Mexico to start a jewelry import business. Plaintiff stated that he then consulted attorney Conrad Bergen. Prior to November 1, 1944 defendant went to the O.P.A. and obtained the sugar ration certificate for November and December, 1944. On November 7, 1944 he met it by plaintiff with a letter reading: "I am advised that it is illegal for me to use these sugar ration certificates, so your loaning him of September 29, 1944 to the O.P.A. is based on false statements and reports. To avoid any trouble, I am willing to agree identically to an assignment or cancellation of my and all interests in this deal, so you can make use of your sugar ration certificates without delay in the usual manner as before." Plaintiff gained the sugar ration certificate in an envelope and returned it to defendant, who took it to Mr. Bergen, who turned it over to the O.P.A. The sugar ration certificate was not used, but were any further sugar

certificates issued by the O.P.A. to the Superior Beverage Company.

Plaintiff testified that he saw defendant at the latter's place of business a few days after October 12, 1943 and again on October 25, 1943; that defendant wanted to tear up the contract because he said it was a "little bit too much for him"; that plaintiff replied that defendant had two or three months to "think the thing over"; that he had an attorney; that plaintiff could not go out and sell his plant at any time defendant might think he should; that the sale was based on defendant's proposition; that defendant presented to plaintiff a formal contract by which the transaction might be rescinded. Plaintiff also testified that at the meeting of October 12, 1943 defendant did not say that he would like to have the contract submitted to the O.P.A.; that toward the end of October, 1943, while in his automobile in front of his place of business, defendant handed him a document and requested him to sign it; and that plaintiff declined to do so. The unsigned document, with a heading reading: "Agreement to purchase stock," states that plaintiff, in consideration of $1, agreed to purchase from defendant 100 shares of stock of the corporation at $1 per share, at any time after November 1, 1943, upon four months' prior offering of the stock, which offering could be made by registered mail addressed to plaintiff at his last known address; that upon delivery of the stock certificate, all corporate minute books, records, stock transfer books, corporate seal and sugar ration certificates or evidences of any other rationed materials to which the corporation might be entitled, to plaintiff within 15 days after 4 months from the date of the original offering, all obligations under a prior agreement between plaintiff and defendant dated October 12, 1943 should cease and determine, except for such sums as may be due and owing between the parties on the date of the delivery of the stock.

certificates issued by the G.T.A. to the Superior Servicing Company.

Plaintiff certified that he saw defendant at the latter's place of business a few days after October 12, 1942 and again on October 22, 1942; that defendant stated to him on the contract because he said it was a "little bit too much for him"; that plaintiff replied that defendant had two or three months to "finish the thing over"; that he had an element; that plaintiff could not go out and sell his plant at any time defendant might think he should; that the sale was based on defendant's production; that defendant presented to plaintiff a formal contract by which the transaction might be rescinded. Plaintiff also testified that at the meeting of October 12, 1942 defendant did not say that he would like to have the contract cancelled by the G.T.A.; that before the end of October, 1942, prior to his potentials in front of his place of business, defendant handed him a document and requested him to sign it; and that plaintiff declined to do so. The respondent testified with a sworn reading: "Agreement to cancel sale," stating that plaintiff, in consideration of $1, agreed to cancel the agreement for shares of stock of the corporation as of the date, or the day after, after November 1, 1942, upon four months' prior notice. The letter, which offering could be made by registered mail addressed to plaintiff at his last known address; that upon delivery of the plant certificate, all concrete plants based, records, plans, computer book, machines and super rating certificates or evidence of any other material materials to which the corporation might be entitled, to plaintiff within 10 days after 4 months from the date of the original offering, all obligations under a prior agreement between plaintiff and defendant dated October 12, 1942 should cease and determine, except for such rights as may be due and owing between the parties on the date of the delivery of the notice.

The physical assets remained on the premises at 1356 West Altgeld Street. They consisted of 1 Model D Dixie Filling Machine, including 7 pockets; 1 - 20th Century Washing Machine complete with motor; 1 - 500 Gal. McKenna Carbonator complete with motor and drive; 1 Baltimore semi-automatic filler complete with motor and attachments; 150 Gal. Bastian Blessing carbonator complete with motor; 1 sand and gravel Filter with connections; 1 Stone Filter; 1 Seltzer Machine; two 500 Gal. Water Tanks; 1 Water Boiler; 1 World Semi-automatic labeling machine complete with motor; and 1 Steel Filing Cabinet. These chattels constituted the entire equipment of the Superior Beverage Company and were sold by plaintiff on February 14, 1944 to the Filter Paper Company for $1,100. He also sold a truck for $350. Defendant did not receive any of this money. Plaintiff endeavored to have defendant execute a bill of sale to a purchaser covering the chattels mentioned and defendant declined to do so. Plaintiff testified that defendant did not ask him to deliver the "equipment"; and that in the month of October, 1944 "the people that were in there said that the machinery had to be got out of there" and that they had to have the room. After October 12, 1943 plaintiff dismantled the equipment and placed it in a corner of the building. The equipment could not be operated when it was dismantled, and was never physically delivered to defendant. Proof as to damages was made by showing the amount of sugar used by the corporation in 1941. Sugar users were allowed a certain percentage of the amount used by them in 1941. Plaintiff testified to the amount and computed the amount due under the allowance at $6 per hundred pound bag to be $6,675.20.

Arguing that the contract does not violate the Emergency Price Control Act or the Regulations adopted thereunder, plaintiff states that the record does not show that the O.P.A. disapproved the transaction or barred the use of the sugar to the Superior

The physical assets remained on the premises as John Hart Lizzola stated. They consisted of 1 model 3 Beale Filling machine, including 7 presses; 1 - 30th factory heating machine complete with motor; 1 - 800 gal. Beckman Gasoline engine with motor and drive; 1 Baltimore semi-automatic filler complete with motor and attachments; 100 gal. Boston Flexible screw-conveyor complete with motor; 1 sand and gravel filter with accessories; 1 lower filter; 1 Bottler feeder; two 800 gal. Water Tanks; 1 water meter; 1 world semi-automatic labeling machine complete with motor; and 1 steel filling cabinet. These assets constituted the entire equipment of the Superior Beverage Company and were sold by plaintiff on February 14, 1941 to the Pilot Pure Company for $4,100. The life sold a truck for $500. Independent did not receive any of this money. Plaintiff endeavored to open Gatewhat accounts a bill of sale to a purchaser covering the identical machinery and Gatewhat declined to do so. Plaintiff testified that Gatewhat did not ask him to deliver the "equipment"; and that in the month of October, 1944 "the people that were in there said that the machinery had to be got out of there" and that they had to move the room. After October 12, 1943 plaintiff discontinued the soft drink and placed it in a corner of the building. The equipment could not be removed when it was dismantled, and was never actually delivered to defendant. Proof as to damages was made by showing the amount of sugar used by the corporation in 1941. Sugar ration were allowed a certain percentage of the amount used by them in 1942. Plaintiff testified to the amount and computed the damage by the value the allowance at 6¢ per hundred which has to be $4,273.72.

Arguing that the contract does not violate the Emergency Price Control Act or the Regulations adopted thereunder, plaintiff states that the record does not show that the O.P.A. disapproved the transaction or barred the sale of the sugar to the Superior

Beverage Company, or that defendant asked for a hearing before any officials of the O.P.A. He states that the permission and approval of the original transfer stands; that if defendant did not get the sugar available to the corporation, it was because he did not call for it; that there is no evidence that Mr. Eisendrath did not submit the final draft of the contract of October 12, 1943 to the O.P.A. before he came to the conference at which it was signed; that plaintiff did not engage in the beverage business after the sale to defendant; that the corporation, after the transfer of the stock, had the full right to use the list of 1,200 customers and the trade name "Superior Brand" and "Piccadilly Club" and the labels and good will built up during its continuous operation since 1937; that the fact that defendant might have used some of the sugar to make a different type of soft drink, having a different formula and his own trade name, is expressly allowed by the O.P.A. Regulations; that under the Regulations none of the equipment of the corporation had to be continued in use; that defendant "did not need to use the trade marks or trade names of the old corporation if he chose not to"; that the Regulations did not say that a transfer cannot be effected "if the old company made carbonated drinks and the new company made non-carbonated drinks"; that there is no evidence that defendant could not at his plant make carbonated drinks if he so chose; that the application to the O.P.A. stated that defendant would continue the business of the corporation at the plant and establishment at 3357 North Clifton Avenue using in whole or in part the equipment of the Sunset Valley Orange Co., not inc., and the sugar alloted to Superior Beverage Co., Inc., would be used in the manufacture of bottled soft drinks under the label, brand and trade names as defendant should designate; that with reference to the statement that the "products will serve the same

Average Company, or that defendant asked for a hearing before any of officials of the U.S.A. He states that the operations and expansion of the original Brewster plants; that if Brewsters did not get the sugar available to the corporation, it was because he did not call for it; that there is no evidence that Mr. Glasgowis did not submit the final draft of the contract or Gulden it, into the U.S.A. before he came to the conference at which it was signed; that plaintiff did not engage in the American Business after the sale to defendant; that the corporation, after the transfer of the stock, had the full right to use the labels of L.Ico corporate and the trade name "Brewster Brand" and "Pleasality Light" on the labels and just will hold to during the negotiations preceding since 1927; that the fact that defendant might have been made or the matter to make a different type of sale that, having a different company and its own trade name, is correctly allowed by the U.S.A. Regulations; that under the Regulations most of the stockholders of the corporation had to be continued in our; that defendant "did not need to use the trade marks or trade names of the old corporation if he chose not to"; that the Regulations did not say that a transfer cannot be effected "if the old company made preliminary orders and the new company made non-conformed trade"; that there is no evidence that defendant could not at his plant make conforming drinks if he so chose; that the Regulations of the U.S.A. states that defendant would continue the business of the corporation at the plant and establishment at 2127 North Fifth Avenue which in whole or in part the continued of the Sweet Tally Drinks Co., and Co., and the sugar related to Pleasant Beverage Co., Inc., would be used in the manufacture of bottled soft drinks under the label, trend and trade names as defendant which Regulations; that with reference to the statement that the products will serve the same

class of customers in substantially the same geographical territory," the fact is that the corporation, before the transfer, and defendant's establishment were a few blocks apart; that a comparison of the application and the O.P.A. Regulations in effect at the time shows the good faith of the parties at the time in laying the matter before the O.P.A.; that defendant did not go to Mr. Barasa for an opinion on the legality of the contract, but for the purpose of seeking a method to avoid it; that no contention is made by reference to any O.P.A. Regulation or interpretative bulletin that the royalty payment for the stock based on the future business and calculated by the amount of critical materials available is prohibited; that the plaintiff wanted to sell his plant outright because of ill health; that he quoted a flat price; that defendant admitted that plaintiff asked him for a figure; that defendant chose to work out a deal whereby he would pay a small consideration for the stock and base the future payment upon the amount of business he could do, it being generally known at the time that the amount of soft drinks that could be made and sold depended upon the critical materials; that he wanted the privilege of using the sugar in his own products if he deemed it advisable, which was his right according to the Regulations in existence; that plaintiff had no way of determining, since the products and business would be intermingled, just what amount of business would be done on the basis of the Superior Beverage Company and what amount of business would be done on the basis of the Sunset Valley Orange Company; that "he could not stand over" defendant and tell the amount of business he would do; that the formula upon which the future payments were to be made was then worked out based upon the business experience of both parties; that the contract was drafted outside of Mr. Alswang's office; that it was brought to that office

clause of customary in substantially the same geographical territory,' the fact is that the corporation, before the transfer, and defendant's establishment were a few places apart; that a comparison of the application and the C.P.R. regulations in effect in 1911 shows the good faith of the parties as the time in dispute the matter before the C.P.R.; that defendant did not go to Ft. Garry for an opinion on the legality of the contract, but for the purpose of seeking a method to avoid it; that no prevention is made by reference to any C.P.R. regulation or interpretative bulletin that the royalty payment for the wheat based on the future business and calculated by the amount of material materials available is prohibited; that the plaintiff cannot be will his plant employ because of ill health; that he started a fire insurance; that defendant claimed that plaintiff asked his for a release; that defendant chose to carry out a full discovery to which say a small consideration for the cross has been the future payment upon the amount of business he could do, it being generally known at the time that the amount of such duties that could be done was also depended upon the critical materials; that in regard the validity of using the wheat in his own business if he deems is suitable, which was his right according to the regulations in existence; that plaintiff had no way of determining, since the problems and business would be determined, just what amount of business would be done in the basis of the transfer because because not that amount of business would be done on the basis of the usual railway company; that "a month not grant away materials and that the amount of business he would do; that the formula upon which the future payments were to be made was then worked out based upon the business experience of both parties; that the contract was drafted outside of Mr. Stewart's office; that it was brought to this office

by Mr. Eisendrath; that if the O.P.A. had deemed the method of payment for the transfer important, it would have so provided by regulation; that payment for the stock could have been made by defendant either as a flat sum or upon a royalty basis; that defendant chose the latter method; that the deal was closed upon this method; and that defendant should not be permitted to escape the performance of his obligation because thereafter he came to the conclusion that he had made an unwise contract.

Referring to the fact that the application stated that the amount of sugar on hand was 95 bags and that the bill of sale states there were 248 bags, plaintiff asserts that both instruments were signed on the same day; that they were not drafted on the same day; that the application was brought in entirely made out, except for the date, by Mr. Eisendrath; that what happened was that the statement about the 95 bags, inserted by Mr. Eisendrath, had probably been given to him by his client who had gained that knowledge from plaintiff, based upon the amount on hand or available through the quotas for the months of July and August, during which time the discussions and negotiations were going on, and during which time the company lessened its operations; that subsequently the quota for September and October was made available, which increased the amount to 240 bags; that entirely through inadvertence the change was not made in the application; that if any mistake was committed it was done through inadvertence; that the bill of sale and preliminary agreement executed on September 29, 1943 operated as an absolute conveyance and an absolute obligation by plaintiff to sell his stock to defendant in the event the O.P.A. granted the application; that no more sugar was to be used as a result of the transfer than had been used in the two separate establishments; that the intent of the regulation that no one get more than his share was not violated; that defendant's testimony that he was taken advantage

by Mr. Blackfriars; this is the C.F.A. has always the method or payment for the transfer instrument, it would have as provided in regulation; that payment for the stock would have been made in defendant alone of a flat fee or item a reality basis; that defendant chose the latter method; that the deal was closed upon this method; and that defendant should not be permitted to assert the performance of his obligation because forwarder be made in the conditions that he had made no waiver required.

Referring to the fact that the negotiation which the amount of wages on hand was 50 that not that the bill of sale states there were 140 bags, plaintiff answer that both instruments were signed on the same day; that they were not dated on the same day; that the negotiation was brought to notice this not, signed for the date, by Mr. Blackfriars; that what happened was that statement about the 50-bags, inserted by Mr. Blackfriars, had actually been given to him by his client who had stated that including free plaintiff, based upon the amount on hand or available in storage the number for the months of July and August, during which time the discussions and negotiations were going on, and having regard to the company keeping its warehouse; that subsequently the stock for September and October was being available, which increased the amount to 140 bags; that notwithstanding subsequently the change was not made in the application; that if any objection was raised it was done through inadvertence; that the bill of sale and preliminary agreement executed on September 19, that executed on an absolute conveyance and an absolute obligation by plaintiff to sell his stock to defendant in the crack the C.F.A. granted the application; that no more money was to be used as a result of the transfer than had been used in the two separate advantagements; that the intent of the regulation that no one was more than his share was not violated; that defendant's witnesses that he was taken advantage

of is belied by his admission that plaintiff's attorney, before the contract was signed, told him that the contract was tying him down for a long time; that a cautionary statement of this kind is inconsistent with defendant's statements designed to make the jury believe that defendant was "high pressured"; that defendant is at liberty to secure the sugar from any source he may choose; that the royalty upon future business is not increased or diminished by the fact that the price of sugar may go up or down during the life of the contract, or that defendant may not use the sugar; that considering that the establishments are several blocks apart, consumers in the same territory are to receive the benefit of the products made with the sugar so that the same general area and class of customers will continue to be served; that the construction which the parties placed upon the contract should be given great weight in determining the intention of the parties and the meaning of the contract; that when defendant asked plaintiff to see him and plaintiff did, on October 25, 1943, defendant said he wanted plaintiff to tear up the contract; that plaintiff said, according to defendant, that he was afraid "it was a little bit too much for him"; that when defendant saw plaintiff the next day he handed plaintiff a piece of paper, the proposed agreement to purchase the stock, the effect of which was to change the contract in only one important respect, namely, that defendant could terminate it at any time on four months' notice at his election, which might be a matter of years; that the conduct of defendant shows clearly that he considered the contract legal and enforceable and based on a fair and full disclosure to the O.P.A.; that defendant's only concern was as to the length of time the contract bound him; that any pretended illegality "came into the picture" only as an afterthought and as one of the defenses urged after he had consulted with another attorney; that the document which defendant endeavored to have plaintiff execute on October 26,

of is belied by his admission that plaintiff's attorney, before the contract was signed, told his boss the contract was turned down for a long time; that a monitoring arrangement or some kind is inconsistent with defendant's statement; because we know too, they believe that defendant was "high pressured"; that defendant is at liberty to assert the super true any matter he may choose; that too reply upon future business is not increased or diminished by the fact that the price of sugar may go up or down during the life of the contract, or that defendant may not have the sugar; that consider-ing that the satisfactories are several blocks apart, monitoring in the same territory are to receive the benefit of the contract made with the sugar so that the same general sales and also customers will continue to be served; that the satisfaction which the parties placed upon the contract should be given great weight in determining the intention of the parties and the meaning of the contract; that when defendant based plaintiff to see has not plain-tiff at, on October 28, 1941, defendant said or words plaintiff to tear up the contract; that plaintiff said, according to defendant, that he was afraid "it was a little bit too much top-hat"; that when defendant saw plaintiff the next day he asked plaintiff, plaintiff if paper, the proposed agreement to purchase the stock, the action of which was to change the contract in only one important respect, namely, that defendant could terminate it at any time on four months' notice of his election, which might be a matter of years; that the conduct of defendant more clearly that he considered the contract legal and enforceable and based on a full and full disclosure to the O.P.A.; that defendant's only answer was as to the length of time the contract bound him; that any unwarranted illegality "came into the picture" only in an afterthought and as one of the defenses upon after he had consulted with another attorney; that the document which defendant endeavored to have plaintiff execute on October 28,

1943 convincingly refutes the testimony of defendant; that on November 1, 1943, after the alleged conversations with plaintiff "about illegality," defendant went to the local ration board and personally received the new sugar certificates for the corporation; that this action was inconsistent with fears of "illegality"; and that the action of defendant in procuring the new sugar certificates was an affirmation of the legality of the contract. Plaintiff also discussed a defense "that the contract was entered into merely to carry out a scheme whereby Charles Palmer, the plaintiff, would be provided with sugar for the manufacture of syrup contrary to the rationing laws of the United States of America." We agree with defendant that it is obvious that in preparing defendant's answer to the complaint the name of Charles M. Palmer was erroneously used in place of the name of defendant, Frank X. Mayer. There was no contention on the trial by anyone that plaintiff was to get the sugar. H e was to get $6 per bag and defendant was to get the sugar. The pleadings were so understood and acted upon during the trial.

Plaintiff was ill and desired to dispose of the Superior Beverage Co., Inc., and the business conducted by it. He owned all of the 100 shares of capital stock. If plaintiff desired to sell the tangible corporate assets constituting the equipment of the corporation, he, as the owner of the capital stock and the president of the corporation, could have done so. He could then have sold his capital stock, surrendering his certificate and having a new certificate issued in the name of the purchaser. The corporation, with a new stockholder holding all of the stock, would have its charter, seal and other corporate papers. Presumably, it would also retain the good will that had been built up. Without the equipment the corporation would be an empty shell. The sugar quota of the corporation was allowed to it on the basis of its manufacture of carbonated beverages. Defendant manufactured fruit juices and syrups.

1943 convincingly refutes the testimony of defendant; that on November 1, 1942, after the alleged conversations with plaintiff "about illegality," defendant went to the Jones Point hotel and personally received the new magic certificates for the corporation; that this action was incompatible with fear of "illegality"; and that the action of defendant in procuring the new magic certificates was an affirmation of the legality of the contract. Plaintiff also discussed a defense that the contract was entered into merely to carry out a scheme obviously illegal under Indian Indian, the plaintiff, could be provided with sugar for the manufacture of grape molasses in violation of the United States of America." He based with defendant that it is obvious that in presenting defendant's answer to the complaint the name of Charles W. Tucker was erroneously used in place of the name of defendant, Frank L. Tayer. There was no contention on the trial by anyone that plaintiff was to get the sugar. It was to get 50 per bag and defendant was to get the sugar. The pleadings were so undertaken and acted upon during the trial.

Plaintiff was ill and desired to dispose of the interests Beverage Co., Inc., and the business conducted by it. He owned all of the 100 shares of capital stock. It constituted designed to sell the tangible corporate assets constituting the equipment of the corporation, he, as the owner of the capital stock and the president of the corporation, could have done so. He could then have sold his capital stock, surrendering his certificates and having a new certificate issued in the name of the purchaser. The corporation with a new stockholder holding all of the stock, would have its charter, real and other corporate powers. Presumably, it would also retain the good will that had been built up. Without the equipment the corporation would be an empty shell. The sugar quota of the corporation was allowed to it as the basis for its manufacture of carbonated beverages. Defendant manufactured fruit juices and syrups.

He did not manufacture carbonated beverages and was not equipped to do so. Manifestly, the corporation could continue to manufacture carbonated beverages and serve its customers if it retained the equipment to do so. The corporation did not manufacture beverages since August 15, 1943. Plaintiff, as its president, wished to dispose of his stock and get out of that business. Under the Regulations, if an entire establishment, including the good will, were transferred, the sugar inventory could be transferred. The sugar inventory, as distinguished from certificates and stamps for sugar, represented the sugar in possession of the corporation. The O.P.A. Regulation contemplated that the establishment acquired by transfer would be continued in substantially the same manner as prior to the transfer. The interpretative bulletin read to the jury by the attorney for plaintiff stated that replacement certificates may be issued to a transferred establishment only after the transferee has registered the establishment and made the following statements on Form R 315, and then only if the board is satisfied as to their truth: "(1) That the entire establishment, including equipment, good will, sugar inventory, sugar ration evidences on hand have been acquired by the transferee; (2) That the transfer establishment will continue to serve the same general class of customers in the same area served by it before the transfer; (3) That the establishment will continue to produce the same product or products, although not necessarily under the same trade name; and (4) That the equipment of a transfer establishment be continued in use after the transfer has been revoked." This bulletin also states that the term "equipment" as used therein means "the essential sugar using equipment of the business."

It will be observed that the application to the O.P.A. signed by the parties on September 29, 1943 was drawn in such a manner as to appear to comply with the O.P.A. Regulations. The application requested that the use of the "present" sugar inventory and future

He did not manufacture carbonated beverages and was not equipped to do so. Finally, the corporation could continue to manufacture carbonated beverages and serve its customers if it obtained the equipment to do so. The corporation did not manufacture beverages since August 16, 1947. Thereafter, as its president, stated in dispose of his stock and yet was of that business. Under the legislation, if an entire establishment, including the good will, were transferred, the sugar inventory could be transferred. The sugar inventory, as distinguished from equipment and stamps for sugar, represented the sugar in possession of the corporation. The O.P.A. Regulation contemplated that the establishment including by transfer would be continued in substantially the same manner as prior to the transfer. The interpretative bulletin used in the jury by the attorney for plaintiff stated that replacement certificates may be issued to a transferee establishment only after the transferee has registered the establishment and made the following statements on form R 616, and then only if the board is satisfied as to their truth: "(1) That the entire establishment, including equipment, good will, sugar inventory, sugar ration certificates on hand have been acquired by the transferee; (2) That the transfer establishment will continue to serve the same general class of customers in the same area served by it before the transfer; (3) That the establishment will continue to produce the same product or products, although not necessarily under the same trade name; and (4) That the equipment of a transfer establishment is continued in use after the transfer has been revoked." This bulletin also states that the term "equipment" is used therein means "the essential sugar using equipment of the business."

It will be observed that the application in the O.P.A. signed by the partner on September 23, 1947 was drawn in such a manner as to appear to comply with the O.P.A. regulations. The application requested that the use of the "present" sugar inventory and future

ration evidences and certificates of the corporation be transferred to defendant; also, that the identity of the corporation would continue "in so far as the use of sugar ration evidences and certificates and other ration commodities are concerned," and that the products would serve the same class of customers and in substantially the same geographical territory as were then being served by the corporation; that it was not intended to merge the sugar ration evidences or certificates of the corporation with those of the Sunset Valley Orange Co., not inc.; and that the corporation would continue to exist and operate as a separate entity. It was not explained why the O.P.A. was requested to transfer the sugar ration certificates to defendant. All that was necessary was that they secure permission for a transfer of the location of the business. The corporation was not selling its assets to defendant. Plaintiff was selling his capital stock to defendant. The ration quota was allotted to the corporation and not to plaintiff. The certificate issued for November and December, 1943 was in the name of the corporation at the new address. In the preliminary agreement of September 29, 1943, contingent on the approval by the O.P.A. of the application for transfer, defendant was to pay $500 for the stock, plus the proceeds of the sale of the equipment of the corporation, plus $6 per 100 pound bag of sugar available to the corporation under its quota for the duration of rationing. On September 29, 1943 a bill of sale was made by the corporation through plaintiff as its president, conveying all the assets, equipment, good will, accounts receivable and sugar inventory on hand, including specifically 24,000 pounds of sugar. The consideration was $2,880. The bill of sale stipulated that if the application to the O.P.A. was rejected or not granted within 30 days, the corporation would be entitled to repurchase everything conveyed under it. The O.P.A. granted the application and consequently the agreement of October 12, 1943 was made. Under that agreement

ration evidence and certificates of the corporation to Deardorff to Safeguard; also, that the liberty of the corporation would continue "in so far as the use of sugar ration evidence and certificates and other ration commodities are concerned," and that the products would serve the same class of customers and in substantially the same geographical territory as were then being served by the corporation; that it was not intended to merge the sugar ration evidences or certificates of the corporation with those of the Sunset Valley Orange Co., not Inc.; and that the corporation would continue to exist and operate as a separate entity. It was not explained why the O.P.A. was requested to transfer the sugar ration certificates to Deardorff. All that was necessary was that they secure cancellation for a breach of the location of the business. The corporation was not selling its assets to Deardorff. Plaintiff was selling his capital stock to Deardorff. The ration quota was allotted to the corporation and not to plaintiff. The certificate issued for November and December 1943 was in the name of the corporation at the one address. In the preliminary agreement of September 29, 1944, contingent on the approval by the O.P.A. of the application for transfer, Deardorff was to pay $800 for the stock, plus the proceeds of the sale of the equipment of the corporation, plus 40 per 100 pounds of sugar available to the corporation under its quota for the duration of rationing. On December 29, 1944 a bill of sale was made by the corporation through plaintiff as its president, conveying all the assets, equipment, good will, accounts receivable and sugar inventory on hand, including constructively 4,000 pounds of sugar. The consideration was $4,800. The bill of sale stipulated that if the application to the O.P.A. was rejected or not granted within 30 days, the corporation would be entitled to repossess everything conveyed under it. The O.P.A. granted the application and consequently the agreement of October 12, 1944 was made. Under that agreement

defendant paid to plaintiff $500 as consideration for the transfer of the stock of the corporation. It was stipulated therein that defendant would attempt to sell "all or any part of the aforesaid tangible manufacturing machinery, furniture or fixtures" of the corporation to such persons and upon such terms and conditions "as directed" by plaintiff, and that should the sale occur within one year, the proceeds should be paid over the plaintiff. In view of the fact that the tangible property was to be sold as directed by plaintiff, it would not be expected that defendant would take physical possession of this property. On or about October 12, 1943 the equipment was dismantled and stored in a corner at the Altgeld Avenue address. In February, 1944 it was sold by plaintiff. It is clear that the parties did not intend that defendant would take physical possession of the equipment, or that the corporation would continue to operate at the Clifton Avenue address and serve the same class of customers as had been served theretofore. The customers of the corporation purchased carbonated beverages, which defendant did not manufacture. Without the equipment, the control of which was retained by plaintiff, neither defendant or the corporation could manufacture carbonated beverages and sell the customers of the corporation. The locations of the respective places of business were a little more than a mile apart. It would not follow, however, that in a city the size of Chicago the customers would be confined to an area in the vicinity of the place of business.

The fact that in the application to the O.P.A. the parties stated that there was a sugar inventory on hand of 95 bags, whereas the parties knew that there were 240 bags (24,000 pounds) on hand, shows clearly the intent to deceive the O.P.A. and violate the Emergency Price Control Act and the Regulations adopted thereunder. In the bill of sale which was executed at the same time as the application to the O.P.A., plaintiff warranted that the corporation

defendant said to plaintiff "Go to consideration for the transfer of the stock of the corporation. It was stipulated further that defendant would attempt to sell "all or any part of the stockholding tangible manufacturing machinery, furniture or fixtures" of the corporation to such persons and upon such terms and conditions "satisfactory" by plaintiff, and that should the sale occur within one year, the proceeds should be paid over to plaintiff. In view of the fact that the tangible property was to be sold as interested by plaintiff, it would not be expected that defendant would take physical possession of this property. On or about October 15, 1940 the equipment was dismantled and stored in a corner of the plants storage address. In February, 1941 it was sold as junkerity. It is clear that the parties did not intend that defendant would take physical possession of the equipment, so that the conversion would continue to operate at the fifteen storage address and serve the same place of business as had been agreed therefore. The customers of the corporation purchased unfamiliar machinery, which defendant did not manufacture. Without the machinery, the conduct of which was retained by plaintiff, neither defendant or the corporation could manufacture automatic machines and sell the machinery of the corporation. The locations of the respective places of business were a little more than a mile apart. It would not infer, however, that in a city the size of Chicago the machinery would be confined to an area in the vicinity of the place of business.

The fact that in the application to the O.P.A. the corporation stated that there was a major inventory on hand of 50 tons, whereas the parties knew that there were but 30 tons (60,000 pounds) on hand, shows clearly the intent to deceive the O.P.A. and violate the Emergency Price Control Act and the Regulations adopted thereunder. In the bill of sale which was presented at the same time as the application to the O.P.A., plaintiff warranted that the corporation

"now has on hand 240 one hundred pound bags of sugar" and specifically sold this quantity of sugar to defendant. As a result of the arrangement between the parties, defendant, early in October, obtained 24,000 pounds of sugar from the Sugar Supply Corporation, paying $1,440 less 1% discount. This was at the ceiling price of 6¢ per pound. At the same time defendant paid to plaintiff through the medium of the corporation, $1,440 on the basis of 6¢ per pound for 24,000 pounds of sugar. Thereby, defendant, by unlawful means, obtained 24,000 pounds of sugar to which he had no right, and plaintiff received 6¢ per pound for such sugar over the ceiling price. In effect, plaintiff sold the corporation's sugar rationing rights to the defendant. It is obvious that in doing so, the parties violated the Emergency Price Control Act and the Regulations. The only explanation offered as to why plaintiff should receive $1,440 for this sugar was that it was "in payment for the loss of time that I was closed down when I first made our agreement." The preliminary agreement was made on September 29, 1943, at which time the corporation, through plaintiff, made the bill of sale. Prior to that there was no obligation on defendant to reimburse plaintiff for any time lost while the plant was not operating. It had not operated since August 15, 1943. The corporation had no right to use the sugar, except in the manufacture of carbonated soft drinks.

The contract sued upon and the other transactions constitute a device to defeat the operation of the Emergency Price Control Act and the Regulations of the Office of Price Administration. To obtain the consent of the O.P.A., certain material misrepresentations were made. It was represented that the establishment would be moved to defendant's address and a part of the equipment would be disposed of, whereas the agreement between the parties was that plaintiff was to have the proceeds of the sale of the equipment of the corporation as part consideration for the sale of the capital stock, and that

"now has an head the one hundred annual duty of sugar" the quantitatively sold duty quantity of sugar to defendant. In a result of the arrangement between the parties, defendant, early in October, obtained 21,000 pounds of sugar free the duty duty duty duty duty duty 11,441 lues 15 discount. This was at the selling price of 4¢ per pound. At the same time defendant sold to plaintiff between the months of the arrangement, 3,480 on the basis of 4¢ per pound for 23,000 pounds of sugar. Therefore, defendant, by indirect means, obtained 44,000 pounds of sugar to which he had no right, and plaintiff received 4¢ per pound for such sugar over the selling price. In effect, plaintiff paid the corporation's sugar retaining rights to the defendant. It is obvious that in doing so, the parties violated the Sugarcane Price Control Act and the regulations. The only explanation offered as to why plaintiff should receive 20,000 for this sugar was that it was "in consideration for the loss of time that I was closed down when I first made our agreement." The preliminary agreement was made on September 24, 1943, at which time the corporation, through plaintiff, made its bid of 4¢. Prior to that there was no obligation on defendant to redeliver plaintiff for any time lost while the plant was not operating. It had not operated since August 19, 1943. The consideration had to flow to the sugar, which is the manufacture of saccharine and fruit.

The contract upon which the plaintiff relied violated the Sugarcane Price Control Act and the Regulations of the Office of Price Administration. In order the consent of the O.P.A., certain schedules of accounting were made. It was recommended that the application would be served to defendant's address and a part of the agreement would be accepted, thereby the agreement between the parties was that plaintiff was to have the proceeds of the sale of the molasses stock, and was as part consideration for the sale of the molasses stock, and was

if defendant took any part of it, he had to pay for it. Plaintiff knew that defendant was not equipped to manufacture carbonated drinks without the machinery. There was no suggestion or contemplation that defendant intended to purchase such equipment for such business. The parties represented to the O.P.A. that defendant would continue the business of the corporation at his Clifton Avenue address, whereas the corporation had no business to continue and had done no business since the middle of August, 1943. Defendant had no equipment with which to continue the making of carbonated drinks. The representation that the corporation would continue to operate as a separate entity was false, because after the sale on September 29, 1943 to the defendant of its physical assets, which were in turn to be under the control of plaintiff, the corporation had nothing left with which to carry on operations and defendant had no carbonating equipment with which to operate that type of business. After the O.P.A. granted the transfer and the agreement of October 12, 1943 was signed, plaintiff dismantled the plant's machinery. No mention was made in the application concerning 24,000 pounds of sugar in the warehouse, although the application and the bill of sale were signed on the same day.

We have no doubt that if full disclosure of the transaction had been made to the officials of the Office of Price Administration, the parties would have been advised that the contemplated transaction was unlawful. We are satisfied that no such disclosure was made to that office. The contract was to continue in effect while there was sugar rationing, but not to exceed 25 years. If after receiving the sugar plaintiff had resold it at $12 per bag, that would clearly have violated the law, or, if as a processor, plaintiff resold the sugar at all, that would be illegal.

if defendant took any part of it, he had to pay for it. Plaintiff knew that defendant was not equipped to manufacture corporation sugar without the machinery. There was no suggestion or contradiction that defendant intended to purchase such equipment for such business. The parties represented to the O.P.A. that defendant would continue the business of the corporation at his Fifth Avenue address, whereas the corporation had no business to continue and had done no business since the middle of August, 1942. Defendant had no equipment with which to continue the making of unrefined sugar. The representation that the corporation would continue to operate as a separate entity was false, because after the sale on September 30, 1943 to the defendant of its physical assets, which were in turn to be under the control of plaintiff, the corporation had nothing left with which to carry on operations and defendant had no purchasing equipment with which to operate that type of business. After the O.P.A. granted the transfer and the agreement of October 12, 1943 was signed, plaintiff discovered the clerk's mistake. No petition was made in the application concerning 24,000 pounds of sugar in the warehouse, although the application and the bill of sale were signed on the same day.

We have no doubt that if full disclosure of the transaction had been made to the officials of the Office of Price Administration, the parties would have been advised that the contemplated transaction was unlawful. It was satisfied that no such disclosure was made to that office. The contract was to continue in effect until there was sugar rationing, but not to exceed 10 years. If after receiving the upper plaintiff's receipt it at its per bag, that would clearly have violated the law, or, if as a processor, plaintiff owned the sugar at all, that would be illegal.

Plaintiff could not deal as a sugar broker without violating the law. What plaintiff did was to take from the corporation all of the tangible assets and all of its sugar inventory. He then, through the medium of the corporation, sold the sugar inventory at $6 above the ceiling price. By the transfer of the stock he then turned over the empty shell of the corporation and was to receive $6 per 100 pound bag of sugar allotted to the corporation so long as sugar controls lasted, whether a day, a week, a month, a year or 25 years. The 24,000 pounds of sugar on hand was sold and paid for without waiting for the O.P.A. to consent to the transfer and plaintiff took $6 per bag over the ceiling price for himself. We find that the clear intent of the parties was to market the sugar quota, and that in doing so they violated the Emergency Price Control Act and Regulations. Plaintiff asserts that defendant was a man of business experience and that he was not deceived. We agree. Both parties knew what they were doing. They were intelligent men and knew they were engaging in an unlawful undertaking. The general rule is that the courts refuse to aid either party to an unlawful contract. The rule is made for the protection of the public and not for the benefit of the parties. The defendant is permitted to set up illegality as a defense.

At the instance of plaintiff, the court gave the following instruction:

"You are instructed that if you find from the evidence that the parties hereto entered into a written agreement on October 12, 1943, and that the plaintiff Charles M. Palmer performed and kept all the conditions of said agreement on his part to be performed and kept, and that the defendant Frank Mayer breached the said agreement and failed to perform the conditions and promises by him to be performed and that thereby the plaintiff sustained damages, you should find the issues for the plaintiff and assess his damages, if any."

This instruction tells the jury that if plaintiff performed and defendant defaulted, the jury should find for plaintiff. Under

Plaintiff could not deal as a major trader without violating the law. That plaintiff did was to take from the corporation all of the tangible assets and all of its major inventory. He then, through the medium of the corporation, sold the major inventory at 8 above the selling price. By the transfer of the stock he then turned over the empty shell of the corporation and was to receive 50 per 100 pound bag of sugar delivered in the corporation so long as sugar controls lasted, whether a day, a week, a year or 25 years. The 24,000 pounds of sugar in question was sold and paid for without violating the O.P.A. to account to the transfer was plaintiff took 50 per bag over the selling price for himself. He did what the other intent of the written was to market the sugar cards, and that is doing so they violated the Emergency Price Control Act and Regulations. Illegality is made that defendant was a mob of business competitors and that he was not deceived. To agree. Both parties knew what they were doing. They were intelligent men and knew they were violating the law in marketing. The general rule is that the courts refuse to aid either party to an unlawful contract. The rule is made for the protection of the public and not for the benefit of the parties. The defendant is permitted to set up illegality as a defense.

At the instance of plaintiff, the court gave the following instructions:

"You are instructed that if you find from the evidence that the parties hereto entered into a written agreement on October 17, 1943, and that the plaintiff Charles E. Fisher performed and met all the conditions of said agreement on his part to be performed and met, and that the defendant Frank Sapp breached the said agreement and failed to perform the conditions and provisions by him to be performed and that thereby the plaintiff sustained damage, you should find the issues for the plaintiff and assess his damage, if any."

This instruction tells the jury that if plaintiff performed and defendant defaulted, the jury should find for plaintiff. Under

the instruction the jury must ignore all questions as to the unlawfulness of the agreement. All they were required to find was whether the contract sued upon was performed by the parties. It was a mandatory instruction. Such an instruction must be complete in its statement of facts which will justify a verdict, and if any material fact or requirement is omitted, the instruction will be erroneous. An instruction of that kind is not cured by others, because if the jury obeyed the instruction, they would render a verdict upon the finding of fact stated in it, regardless of the omitted fact or requirement. Chicago & A. R. R. Co. v. Kuckkuck, 197 Ill. 304; Montgomery Coal Co. v. Barringer, 216 Ill. 327; Cromer v. Borders Coal Co., 246 Ill. 451; Illinois Iron & Metal Co. v. Weber, 196 Ill. 526; Hanson v. Trust Co., 380 Ill. 194. The giving of this instruction was error and would require the reversal of the judgment and a remandment of the cause for a new trial, were it not for the patent illegality of the transaction. We are satisfied that twelve jurors, acting as reasonable men and women, could not reach any other verdict than that the transaction was illegal. Therefore, the judgment of the Circuit Court of Cook County is reversed and judgment is entered here for defendant and against plaintiff.

JUDGMENT REVERSED AND JUDGMENT HERE
FOR DEFENDANT AND AGAINST PLAINTIFF.

LEWE, P.J. AND KILEY, J. CONCUR.

the instruction the jury must ignore all questions as to the substantiveness of the agreement. All that were required is that and whether the contract used upon was performed by the parties. It was a mandatory instruction. Such an instruction must be complete in its statement of facts which will justify a verdict, and if any material fact or requirement is omitted, the instruction will be erroneous. An instruction of that kind is not saved by silence, because if the jury obeyed the instruction, they would render a verdict upon the finding of fact stated in it, regardless of the omitted fact or requirement. Chicago & A. R. R. Co. v. Lucas, 127 Ill. 424; Montgomery Ward Co. v. Harrison, 216 Ill. 207; Chicago v. Corbett Ind. Co., 246 Ill. 424; Illinois Cent. R. R. Co. v. Baker, 188 Ill. 236; Thomas v. Ingal Co., 280 Ill. 161. The giving of this instruction was error and which vitiates the verdict of the judgment and a reversal of the cause for a new trial, were it not for the patent illegality of the transaction. We are satisfied that twelve jurors, acting as reasonable men and women, would not reach any other verdict than that the transaction was illegal. Therefore, the judgment of the circuit court of Cook County is reversed and judgment is entered here for defendant and against plaintiff.

Judgment reversed.
Not considered and entirely authority.

Lord, P.J., Gad Kiss, J., concur.

43842

GEORGE HARAM, Administrator of the Estate of MARKUS E. HARAM, Deceased,	APPEAL FROM
Plaintiff - Appellant,	CIRCUIT COURT
v.	COOK COUNTY.
FRANK KRANZ and CECELIA TOMLINSON, doing business as FEDERAL CARTAGE COMPANY and D. K. ROTH, WALDO ROTH, HAROLD ROTH and FREEDA ROTH GRENNAN, doing business as the CORN BELT HATCHERY COMPANY,	
Defendants - Appellees.	

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a wrongful death action. Chap. 70, Pars. 1 & 2, Ill. Rev. Stats. The trial court sustained defendant Harold Roth's defense based on the statute of limitations. The suit was dismissed and plaintiff appeals.

On June 7, 1938, the complaint was filed against Kranz and Tomlinson, doing business as Federal Cartage Company, and Corn Belt Hatchery Company, a corporation. It alleged that plaintiff's intestate Markus E. Haram on February 28, 1938, was driving north on U. S. Route No. 45 near Chebanse, Iroquois County, Illinois; that his car collided with another operated by the Federal Cartage Company, going in the opposite direction; that following this collision a motor truck operated by the Corn Belt Hatchery Company, a corporation, closely following the car of the decedant, also collided with decedent's car and that as a result of these collisions decedent suffered injuries from which he died March 4, 1938.

The original summons issued June 7 and was returned showing service on Kranz and Tomlinson, doing business as the Federal Cartage Company; and stating that the defendant corporation could not be found. May 9, 1939 a special deputy was appointed to serve that "corporation". His return made May 12, showed service

ROYCE HUNT, Administrator of the Estate of MARVIN A. HUNT, Deceased,	APPEAL FROM
Plaintiff - Appellee,	CIRCUIT COURT
v.	
FRANK KNAUS and CAROLYN TOMLINSON, doing business as FEDERAL DAIRYMEN COMPANY and U. S. ROUTE, also doing business as THE GOOD WILL DAIRY COMPANY,	
Defendants - Appellees.	

Mr. JUSTICE SMALL DELIVERED THE OPINION OF THE COURT:

This is a wrongful death action. Docs. 70, Pers. 1 & 2, Ill. Ser. Stats. The trial court sustained defendant Harold Hunt's defense based on the statute of limitations. We note the dismissed and plaintiff appeals.

On June 7, 1958, the decedent was killed against Frank and Tomlinson, doing business as Federal Dairymen Company, and Good Will Dairy Company, a corporation. It alleged that decedent's Intrastate Marine - Dates on February 22, 1958, was driving north on U. S. Route No. 45 near Gardner, Grundy County, Illinois; that his car collided with another operated by the Federal Dairymen Company, going in the opposite direction; that following this collision a motor truck operated by the Good Will Dairy Company, a corporation, closely following the car of the decedent, also collided with decedent's car and that as a result of these collisions decedent suffered injuries from which he died June 4, 1958.

The original summons issued June 7 and was returned showing service on Frank and Tomlinson, doing business as the Federal Dairymen Company; and stating that the defendant corporation could not be found. May 8, 1959 a special deputy was appointed to serve that "corporation". His return made May 11, showed service

on the "corporation" by leaving a copy at its office in Chicago Heights, Illinois. On February 7, 1940 an amended complaint was filed with leave of court. The "corporation" was eliminated as defendant and D. K. Roth, Waldo Roth, Harold Roth and Freeda Roth Grennan, doing business as the Corn Belt Hatchery, were substituted as defendants. There was no other change in the complaint. Summons issued and on February 18 was returned by the Sheriff of Iroquois County certifying service on Harold Roth, personally. On March 14, 1940 Harold Roth moved to dismiss on the ground that the cause of action did not accrue within a year. April 12, the motion was denied and defendant ordered to answer. He subsequently answered. On February 26, 1946, an order was entered dismissing plaintiff's action. This order recited that the cause was heard on Harold Roth's motion, based on his "plea of the statutes of limitations," and that the motion was sustained and the suit was dismissed at plaintiff's cost.

The words, "statute of limitations" are not used appropriately in describing the one year limitation in the Injuries Act. Metropolitan Trust Co. v. Bowman Dairy Co., 369 Ill. 222. There is no record of Roth's answer having been withdrawn and it does not contain the defense of "statute of limitations." There is no record either of defendants' motion based on a plea of "statute of limitations" other than the motion which had theretofore been denied on April 12, 1940. The record does not show that that order of denial was vacated.

The trial court may, and has the duty to, correct erroneous rulings at any time before final judgment. Shaw v. Dorris, 290 Ill. 196; Roach v. Village of Winnetka, 366 Ill. 578; Mater v.

on the "corporation" by leaving a copy at its office in Belvedere, Illinois. On February 7, 1940 an amended complaint was filed with leave of court. The "corporation" was dismissed as defendant and C. E. Toth, Inc., Toth, Harold Toth and Joseph Toth, doing business as the Jane Doll Company, were substituted as defendants. There was no other change in the complaint. Service issued and on February 22 was returned by the "sheriff" of Kingsville County certifying service on Harold Toth, personally. On March 11, 1940 Harold Toth moved to dismiss on the ground that the "sheriff" serving his writ was a pair. Until it, the motion was denied and defendant ordered to answer. He petitioned for rehearing. On February 23, 1940, an order was entered dismissing "plaintiff's action. This order recited that the motion had been in Judge Toth's motion, based on his "plea of the jurisdiction of jurisdiction," and that the motion was sustained and the suit was dismissed at plaintiff's costs.

The words, "plaintiff of jurisdiction" are not used appropriately in Tempelsky was the same jurisdiction in the original suit. Metropolitan Trust Co. v. Bonner Cable Co., 280 Ill. 277. There is no record of Toth's motion stating that defendant did it does not contain the defense of "plaintiff of jurisdiction." There is no record either of Tempelsky motion which is a plea of "plaintiff of jurisdiction" stating that the motion which the motion have been sustained on that it. Toth. The record does not show that there was of jurisdiction was sustained.

The trial court ruy, and has the right to, entertain motions filings at any time before final judgment. Ohio v. Jordan, 290 Ill. 146; Hanna v. Pilsen of Illinois, 301 Ill. 478; Ruhl v.

Silver Cross Hospital, 285 Ill. App. 437; and McGraw v. Oellig, 309 Ill. App. 628. In none of those cases was there a situation comparable to the one before us. Here the defense was sustained and the cause dismissed without vacating the previous order denying a prior motion based on the same defense and without withdrawing the answer which did not contain the defense. A written motion to dismiss is not in the record before us. In LePitre v. Chicago Park District, 290 Ill. App. 345, defendant filed a demurrer which was overruled and it then filed a plea of not guilty. About a year later on the Court's motion, the plea was withdrawn and the demurrer, theretofore overruled was sustained. This Court reversed that order, finding that no demurrer was pending and that a contradictory order respecting the demurrer was still of record. We believe the action of the trial court in the instant case was erroneous.

Notwithstanding this error, we believe that the judgment should be affirmed. We see no merit in the contention that the amended complaint naming Harold Roth as a defendant was not, as to him, the commencement of a new suit. In Pennsylvania Company v. Sloan, 125 Ill. 72 and Summers v. Hendricks, 300 Ill. App. 498, cited by plaintiff, the defendants were served in time but under a misnomer. Neither is there any merit to the contention that section 46 of the civil practice Act governing amendments would relate the amended complaint back to the date of the original complaint. Fitzpatrick v. Pitcairn, 371 Ill. 203. The cause of action against Harold Roth did not accrue within one year from the suit against him. We believe it would be fruitless to send this case back to the trial court.

The order appealed from is, therefore, affirmed.

ORDER AFFIRMED.

LEWE, P.J. AND BURKE, J. CONCUR.

Silver Cross Foundry, 298 Ill. App. 427; and Bowen v. Gaitis, 308 Ill. App. 628. In some of those cases was there a situation comparable to the one before us. Here the defendant was qualified and the cause dismissed without vacating the previous order sustaining a prior motion based on the same defense and without striking the answer which did not contain the defense. A written motion to dismiss is not in the record before us. In Lerkins v. Chicago Park District, 290 Ill. App. 240, defendant filed a demurrer which was overruled and it then filed a plea of not guilty. About a year later on the court's motion, the plea was withdrawn and the demurrer, therefore, overruled was sustained. This court reversed that order, finding that no demurrer was pending and that a contradictory order respecting the demurrer was still of record. We believe the action of the trial court in the instant case was erroneous.

Notwithstanding this error, we believe that the judgment should be affirmed. We see no merit in the contention that the amended complaint merely herein with or a defendant was not, as to him, the commencement of a new suit. In Commonwealth Edison v. Olson, 325 Ill. 72 and Bowen v. Gaitis, 308 Ill. App. 628, cited by plaintiff, the defendants were served in time but under a misnomer. Neither is there any merit to the contention that section 46 of the civil practice act governing amendments would relate the amended complaint back to the date of the original complaint. Fitzgerald v. Fitzgerald, 371 Ill. 532. The cause of action against Herald Bob did not accrue within one year from the suit against him. We believe it would be fruitless to send this case back to the trial court.

The order appealed from is, therefore, affirmed.

ORDER AFFIRMED.

Lewis, P.J. and Burke, J. concur.

O.K
GWB

Gen. No. 10081. Agenda No. 4.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1946.

CECIL PRINCE, Plaintiff-Appellee, vs. ASHER H. BOGARD, doing business as BOGARD'S DRUG STORE, Defendant-Appellant.	)	Appeal from Circuit Court, Peoria County.

F. G. WOLFE: P. J.

Cecil Prince filed a suit in the Circuit Court of Peoria County, Illinois, against Asher H. Bogard, doing business as, Bogard Drug Store, in which he claimed damages for personal injuries, as a result of the fall in the defendant's Drug Store located in Peoria, Illinois.

In the petition, the plaintiff charged that the defendant negligently maintained and kept the stairway leading from the first floor of the store to the basement thereof, in that he did not keep the stairway unobstructed and free of cartons of merchandise and empty cartons, so as to prevent anyone lawfully using said building and stairway from falling down the same, and that the plaintiff had

no knowledge of the dangerous condition of the stairway, and while carrying a carton filled with soft drink bottles down said stairway, he struck a carton and fell and was injured. It is also alleged that the stairway was dark and not properly lighted, and that the defendant was negligent in failing to warn the plaintiff of the condition of the stairway.

The defendant filed his answer in which he denied all allegations of negligence on his part, and charged that the direct and proximate cause of the fall and injuries to the plaintiff was his own carelessness and negligence. The case was submitted to a jury, and the plaintiff introduced his evidence. At the close of the plaintiff's case, a motion was made for a directed verdict in favor of the defendant. This motion was overruled. A like motion was made at the close of all of the evidence. This motion was likewise overruled. The jury returned a verdict in favor of the plaintiff, and assessed his damages at $2,300.00. Judgment was entered on this verdict from which the defendant has perfected an appeal to this Court.

The defendant was in possession of the first floor and basement of the building in question, in which he conducted a drug store, and sold drugs, merchandise, sundries and bottles of soft drinks. The plaintiff came into the store to return a carton of empty bottles, and was directed to take them down to the basement. In so doing, as he neared the bottom of the stairway leading from the first floor to the basement, he fell and was injured. The

plaintiff had sustained an injury to his right leg while he was in service, and was somewhat disabled so that he limped quite noticeably. The injury he sustained in the fall of which he now claims damages, was to his right knee.

The appellant has assigned numerous reasons why the judgment should be reversed. Complaint is made as to the form of Plaintiff's Given Instruction No. 3, which relates to the method of determining the damages of the plaintiff, in that, the instruction, referring to the evidence, omits to state the preponderance of the evidence. In the case of Edwards vs. The Hill-Thomas Lime Company, 378 Ill. at Page 189, (a personal injury case,) the Court had occasion to criticize a similar instruction, and in the opinion, we find this language: "This instruction was on the subject of the measure of damages. It is subject to the criticism made against it by appellant that it did not limit the damages to those proved by the preponderance of the evidence. The instruction was erroneous in this respect, but if that was the only error in the case, it would not warrant a reversal." The instruction No. 3 is subject to criticism as pointed out by the appellant.

At the time of the empanelling of the jury to try the case, and while the attorney for the plaintiff was examining Alice Cassavant, a prospective juror, it is claimed by the defendant that the plaintiff's attorney asked prejudicial, inflammatory and improper questions, and the defendant's case was prejudiced thereby. Out of the presence of the jury, defendant, by his counsel, made an oral motion asking the Court to discharge the eight jurors previously sworn to try the cause,

and to continue the cause because of prejudice; and objected to certain questions asked certain prospective jurors by counsel for the plaintiff.

The reporter did not take the question of the attorneys to the prospective jurors, but Mr. Heyl, Attorney for the defendant, stated to the Court what had happened. Mr. Heyl stated: "Counsel asked this woman what her husband's business is and she replied he was employed at the American Distilling Company, and on further inquiry, that he had to do with the insurance of the company. Then she was asked if he had ever talked over with her any of the insurance matters for the company, and she replied in the negative. He asked her if she had ever discussed with him any of the insurance matters for the company, and she replied in the negative, and with that he excused her." It is charged by the attorney for the defendant that these questions and answers were prejudicial to the defendant's case, and were propounded to the juror for the sole purpose of getting before the jury that an insurance company was defending the suit for the defendant. The attorney for the plaintiff, on being asked if he had any dispute as to truth of the statement which was made with reference to the questions asked, denied that they were asked with any intent to prejudice the jury. He stated that the questions referred to were asked because Mrs. Cassavant had been called as a prospective juror in a previous case in which he was counsel, and she had stated at that time, that her husband was in charge of insurance matters for his company. The attorney for the defendant then stated, "Then I take it you knew what her husband's business was, and that he was connected with insurance before you asked the question in this case, is that correct?" To which the attorney for the plaintiff said:

"Well, I am not going to answer that."

From reading the statement of plaintiff's attorney, it is evident that he does not deny that statement of defendant's attorney as to what was said in the examination of this juror is correct, but denies that it was done with the intent to prejudice the jury, as charged by the attorney for the defendant. The intent with which the questions were asked is not as important as the effect that it had on the jurors. An attorney, in a personal injury suit, should not inform the jury that the defendant is insured against liability. It is not proper for him to accomplish this purpose indirectly by asking questions having that effect when examining persons offered as jurors. Mithen vs. Jeffery, 259 Ill. 372, Clark vs. Hasselquist, 304 Ill. App. Page 41.

Complaint is also made as to the testimony of Doctor E. E. Howard, a physician, who treated the plaintiff for his injuries. It is admitted that the plaintiff had an injured leg prior to the accident, and had a noticeable limp. Over the objection of the defendant, the doctor was permitted to testify as to whether medical treatment will be required <u>from this time forward</u>. The doctor's testimony should have been confined to the injury of the plaintiff which he claims was caused by this accident, for which he claims damages.

We do not express any opinion as to the weight of the evidence, or the amount of the verdict, but from an examination of the record in this case, it is our conclusion that the defendant is entitled to a new trial. The case is therefore reversed, and the cause remanded.

Reversed and cause remanded.

"Well, I am not going to answer that."

From reading the statement of plaintiff's attorney, it is evident that he does not deny that statement of defendant's attorney as to what was said in the examination of this juror is correct, but denies that it was done with the intent to prejudice the jury, as charged by the attorney for the defendant. The intent with which the questions were asked is not as important as the effect that it had on the jurors. An attorney, in a personal injury suit, should not inform the jury that the defendant is insured against liability. It is not proper for him to accomplish this purpose indirectly by asking questions having that effect when examining prospective jurors. Mitchen vs. Jeffery, 200 Ill. App. 472; Chicago City Railway Co. vs. Mitchell, 204 Ill. App. Page 41.

Complaint is also made as to the testimony of Doctor E. E. Howard, a physician, who treated the plaintiff for his injuries. It is admitted that the plaintiff had an injured leg prior to the accident, and had a noticeable limp. Over the objection of the defendant, the doctor was permitted to testify as to whether medical treatment will be required from this time forward. The doctor's testimony should have been confined to the injury of the plaintiff which he claims was caused by this accident, for which he claims damages.

We do not express any opinion as to the weight of the evidence, or the amount of the verdict, but from an examination of the record in this case, it is our conclusion that the defendant is entitled to a new trial. The case is therefore reversed, and the cause remanded.

Reversed and cause remanded.

D. K
Murphy

2753A

Abstract

Gen. No. 10098 Agenda No. 8

IN THE APPELLATE COURT OF THE

STATE OF ILLINOIS

****

SECOND DISTRICT 3 30 I.A. 621

OCTOBER TERM, A.D. 1946

EDGAR R. RULISON, ADMINISTRATOR OF THE ESTATE OF JOHN VINCENT RULISON, DECEASED. PLAINTIFF-APPELLEE,	
v.	APPEAL FROM THE CIRCUIT COURT OF KANKAKEE COUNTY
SPROUT & DAVIS, INC., A CORPORATION AND DANIEL W. MURPHY, DEFENDANTS-APPELLANTS.	

Dove, J.

This cause is here on a petition for leave to appeal from an order of the circuit court of Kankakee County granting the motion of plaintiff-appellee for a new trial, in a suit against defendants-appellants for damages on account of the alleged wrongful death of appellee's intestate in an automobile accident, wherein the jury returned a verdict finding the defendants guilty and assessing plaintiff's damages in the sum of $1000.00.

The accident occurred on State Route No. 1, a paved route known as the Dixie Highway, running generally north and south through the east side of the State. On May 12, 1945 about 8:30 P.M. Daylight Savings Time, defendant Daniel W. Murphy was driving a gas truck owned by the other defendant, Sprout & Davis, Inc., southerly on the Dixie Highway, which, at a point about three miles south of the City of Milford, is intersected by an east and west gravelroad. The paved portion of the State Highway at this point was 20 feet wide, with a shoulder approximately 8½ feet on each side. Mr. Murphy testified that as he approached the gravel crossroad, one

of his two fuel tanks, connected to the motor, ran dry, and he pulled over onto the left shoulder east of the pavement, to switch tanks, stopping just north of the gravel road; that he switched tanks by turning a faucet on the floor of the cab; that he pulled over onto the east shoulder because it had been raining the day before, and the east shoulder was wider and had more gravel and he doubted having a clearance on the west shoulder; that the road was dry and the weather was clear; that he stopped about half a minute to shift tanks and then proceeded to make a wide turn into the gravel road east of the pavement so that he approached the pavement on the gravel road from an easterly direction, and then turned to his left on the pavement to go south. It was about dusk, just before dark. According to Murphy's testimony, the head lights on the truck, three lights on top of the cab, an amber light on each side of the truck in front, a red light on each side in the back, and five lights on the tail end were all burning; that he flickered his lights as he pulled up on the highway, but gave no other signal; that at that time he saw cars coming from the south on the highway, the first of which appeared to be about six blocks away; that he was on the gravel road when he saw this car and it was in the east lane going north and had its lights on; that as he kept pulling out on the highway in second speed the car kept coming at him without slowing down; that he had not cleared the east lane and it was blocked by his truck, except about three feet at the rear end of his trailer, which was about three feet west of the east edge of the pavement. He further testified that at the time of the accident his truck head lights were pointed directly south on the west side of the pavement and the trailer was diagonally across the east lane as indicated above.

The automobile which Murphy saw coming from the south ran into and under the body of the trailer with such force that it

of his two fuel tanks, connected to the motor, ran dry, and he pulled over onto the left shoulder east of the pavement, to switch tanks, stopping just north of the gravel road; that he switched tanks by turning a faucet on the floor of the cab; that he pulled over onto the east shoulder because it had been raining the day before, and the east shoulder was wider and had more gravel and he doubted having a clearance on the west shoulder; that the road was dry and the weather was clear; that he stopped about half a minute to shift tanks and then proceeded to make a wide turn into the gravel road east of the pavement so that he approached the pavement on the gravel road from an easterly direction, and then turned to his left on the pavement to go south. It was about dusk, just before dark. According to Murphy's testimony, the head lights on the truck, three lights on top of the cab, an amber light on each side of the truck in front, a red light on each side in the rear, and five lights on the tail end were all burning; that he dim-ned his lights as he pulled up on the highway, but gave no other signal; that at that time he saw cars coming from the south on the highway, the first of which appeared to be about six blocks away; that he was on the gravel road when he saw this car and it was in the east lane going north and had its lights on; that he kept watching one on the highway in second gear the car kept coming at him without slowing down; that he had not observed the west lane and it was blocked by his truck, except about three feet at the rear end of his trailer, which was about three feet west of the east edge of the pavement. He further testified that at the time of the accident his truck head lights were painted dirty brown on the west side of the pavement and the trailer was diagonally across the east lane as indicated above.

The automobile which Murphy saw coming from the south ran into and under the body of the trailer with such force that it

was necessary to lift the end of the trailer in order to pull the automobile back from under it. Two trucks were required in the operation. The automobile was a Ford and was traveling north in the east lane of the pavement. Three boys occupied the front seat, Francis Jepsen, the driver; Justin Ford, owner of the car, who sat on the right; and appellee's intestate, John Vincent Rulison, who sat between them. The Jepsen boy, 15 years old, held a driver's license; the Rulison boy was 14 years of age. Both of them were apparently dead when the witnesses got there, and the Ford boy died shortly afterward.

Appellee's intestate was a talented and industrious youth. His violin teacher testified that he had been taking lessons from her for about a year, and had taken lessons from her at another time; that she was convinced he was a talented boy and had the making of a violin artist. His mother testified that he was an altar boy in church, and was a good boy; that when he was eight years old, he had a paper route, then worked on an asparagus farm, and at the time of his death had another paper route; that he turned the money over to the family when they needed it, and turned over almost all he got. She further testified that the family now consisted of the parents and five children still living, ranging in age from seven to eighteen years.

The motion for a new trial assigned several grounds, including the ground that the damages assessed were against the manifest weight of the evidence; that at a trial in the same court one week later involving the same facts, the plaintiff was awarded $8500 damages, and that therefore the verdict in this case is not sufficient and is against the manifest weight of the evidence; that the jury room was without heat and the jurors had to wear their coats and some of them became very cold, resulting in their changing their opinion in order to arrive at a unanimous conclusion so that

was necessary to lift the end of the spring in order to pull the automobile back from under it. Two females were sitting in the position. The automobile was a Ford and was travelling north in the west lane of the roadway. Julia Tyle occupied the front seat, Francis Joyce, the driver; Julia Tyle, owner of the car, was sat on the right; and Squillace's brother, John Vincent Squillace, was sat behind them. The driver, Joy, is now dead, killed a driver's license; the Mallison Joy was 16 years of age. Most of them were apparently dead when the ambulance got there, and the two Joy girls shortly afterward.

Squillace's insurance was a limited and inadequate policy. The widow Sander testified that he had been taking lessons from one for about a year, and had taken lessons from one or another teacher; that she was convinced he was a talented boy and was making of a violin artist. His mother testified that he was an altar boy in church, and was a good boy; was when he was eight years old, he had a paper route, then worked in a newspaper office; at the time of the death had earlier a paper route; that he turned the money over to the family when they needed it, and turned over almost all he got. The father testified that the family, now consisted of the parents and five children still living, ranging in age from twenty to eighteen years.

The action for a wrongful death brought against Joy, including the Joyce (sic) in damages amounting were against the machine weight of the pleadings; that of a child in the same court one was listed according to were Joyce. The [illegible] was asserted $8000 damages, and that [illegible] the evidence in this case in not sufficient and is against the manifest weight of the evidence; that the jury was without [illegible] the jurors and to wear their coats and hats of their house very cold, affecting in their consulting their opinion in order to arrive at a unanimous conclusion as that

they could leave the jury room and go home; that this was particularly true of some of the lady jurors who made the concession rather than to face further exposure to the cold and endanger their own health in so doing. An affidavit by one of the lady jurors to this effect, in support of the motion, was attached thereto. A counter-affidavit by the bailiff, showing custody of the jury for about four hours, recited that during that period he escorted the jury to a restaurant for their evening meal, and that none of the jury complained to him about the cold.

Appellants argue that affidavits of jurors as to what took place in their retirement cannot be received to impeach their verdict, citing cases which they claim are applicable. They made no motion to strike the affidavit nor the portion of the motion relative thereto, but contented themselves with merely filing a counter-affidavit. The record does not tend to show that the trial court gave the juror's affidavit any weight or took it into consideration in granting the motion for a new trial, and nothing is shown in relation thereto which furnishes any basis for reversing the order granting a new trial.

The granting of a new trial is a matter of sound legal discretion, and a court of review cannot interfere with that power in the absence of an abuse thereof. (Gillet v. Stone, 5 Scam. 539, 543: In re: Annie F. Velie, etc., 318 Ill. App. 550, 552, and cases there cited; Park v. Lopez, 306 Ill. App. 486, 420). Though the amount of damage to be awarded for personal injuries is committed in the first instance to the jury, the trial court has jurisdiction to set aside a verdict which it considers manifestly or grossly inadequate or excessive and grant a new trial. Jacobson v. Umland, 321 Ill. App. 162).

At common law, new trials were not allowed on the ground that damages allowed by the jury in an action of tort were insufficient, but the rule in Illinois is that a new trial may be

they will leave the jury room and go home; such this was particularly true of some of the jury members who had to commute much more to face further expense to the city and manpower shortage they could ill afford to bring. In affirming the jury was not coerced improperly in this action, in support of his action, was a concurring opinion. A concurring-dissenting by the "minority" minority member of the jury who stated that he received this action that should be considered the jury as a responsible for their verdict and that some of the jury deliberations without the court.

Appellants argue that affirmative - it judges in the jury trial place in their settlement should be involved in judicial judge, getting rules notice they shall not judicial. The court is right to state the affirmed the process of the written instructions, the contained instructions from charge filing a [illegible]. The charge that the jury [illegible] affirmative any judge [illegible] notice in [illegible] the notice the a new trial, and [illegible] in [illegible] which [illegible] the [illegible] [illegible] a new trial.

The granting of a new trial is a matter of [illegible] discretion, and a court of review cannot interfere with [illegible] in the absence of an abuse thereof. Fallon v. [illegible], [illegible] Ill. in re: Anna F. Fallon, [illegible] 3d Ill. [illegible] 1951; [illegible] [illegible] Fox v. [illegible], 3d Ill. App. 2d, 1957. Having the amount of damage in [illegible] the [illegible] [illegible] in the first instance to the jury, the trial court has jurisdiction to set aside a verdict only if [illegible] [illegible] or [illegible] [illegible] [illegible] v. [illegible], [illegible] Ill. App. 2d).

At common law, any jurisdiction was [illegible] on the ground that damage allowed by the jury in a [illegible] of [illegible] [illegible] sufficient, "if the rule is [illegible] it that a new trial may be

granted where the verdict is grossly inadequate, for the same reasons as those governing where the verdict is excessive. (Borkstrom v. South Shore Garages, 323 Ill. App. 285; Avrams v. Fuller, 325 Ill. App. 694; Riley v. City of Chicago 208 Ill. App. 260; Hackett v. Pratt, 52 Ill. App. 346.)

Among the cases where inadequacy of the amount of the verdict was a leading factor in granting a new trial are: Borkstrom v. South Shore Garages, supra; Avrams v. Fuller, supra: Riley v. City of Chicago, supra; Wallace v. City of Rock Island, 323 Ill. App. 639, 642.

In granting the motion for a new trial, the trial court had before it the evidence that there were seven beneficiaries among whom the $1000 would be apportioned; the talent, industry and prospects of the decedent, his contributions to the family, his age, good health and life expectancy; and that in another case growing out of the same accident there was a verdict of $8500 in favor of the plaintiff. We are of the opinion that these facts were sufficient to justify the granting of the motion for a new trial.

As this cause must be tried again, it might be suggested that the statutory subject matter of four refused instructions offered by the plaintiff are proper subjects upon which to instruct the jury if the instructions are properly drawn. Instruction 12 given at the instance of the defendants treats only of negligence on the part of the defendant company, disregarding the question of negligence on the part of the driver, and the 13th instruction treats of due care on the part of the driver only.

The order granting the plaintiff's motion for a new trial is affirmed.

Order affirmed.

granted where the verdict is grossly inadequate, for the same reasons as those governing where the verdict is excessive. [illegible] [illegible] v. [illegible], 2d Ill. App. 3d, 1971; Arnold v. Fuller, 2d Ill. App. 3d, 1971; Dorr v. City of Chicago, 2d Ill. App. 3d, 1971; Barnett v. Brown, 3d Ill. App. 3d.)

Among the many where inadequacy of the amount of the verdict was a leading factor in granting a new trial are: Anderson v. South Shore Bowling Center, Inc., 2d Ill. App. 3d, 1971; Hoffman v. City of Chicago, 1st Dist., 1971; Wallace v. City of Zion Island, 1st Ill. App. 3d, 1971.

In granting the motion for a new trial, the trial court had before it the evidence and there was some conflicting evidence which the trial judge considered in the exercise, insofar as prospects of the decedent, his contributions to the family, his good health and life expectancy, and had in another case granted out of the same accident there and a verdict of $5000 in favor of the plaintiff. In one of the cases, and those facts were sufficient to justify the granting of the motion for a new trial.

In this case, the trial court, in order to suggested that the statutory subject matter of some proposed instructions offered by the plaintiff was proper subject for consideration of the jury if the instructions are properly drawn. Instruction is given at the instance of the defendant company, disregarding the question of negligence on the part of the driver, and the sole issue is the question of due care on the part of the driver only.

The order granting the plaintiff's motion for a new trial is affirmed.

Order affirmed.

Wolfe

2763 A

Abstract

GEN. NO. 10101 AGENDA NO. 11

IN THE APPELLATE COURT OF THE

STATE OF ILLINOIS

SECOND DISTRICT 330 I.A. 622

OCTOBER TERM, A. D. 1946.

THE SPERO ELECTRIC CORPORATION a corporation, PLAINTIFF-APPELLANT, v. R. H. WILSON, d/b/a FOREST CITY ELECTRIC SUPPLY CO., DEFENDANT-APPELLEE.	APPEAL FROM THE CIRCUIT COURT OF WINNEBAGO COUNTY

Dove, J. delivered the opinion of the court:

Appellant, a Cleveland, Ohio, manufacturer of electrical appliances, sued appellee in the circuit court of Winnebago County to recover a balance of $517.43, alleged to be owing appellant for electrical appliances furnished appellee for installation at Camp Ellis, an army camp near Table Grove, Illinois. Appellee did business as Forest City Electric Supply Co., and also as Wilson Electric Company, and had a contract with the United States Government for furnishing and installing certain electric lighting appliances, consisting principally of goose neck fixtures with porcelain sockets, metal flanges, and sheet metal reflectors, for outdoor use at the army camp. The appliances were shipped by appellant to Wilson Electric Company at Table Grove. Appellee filed an answer to the complaint, and a counterclaim, asking judgment against appellant in the sum of $764.00. The cause was heard by the court without a jury, and a judgment for $78.05 and

IN THE APPELLATE COURT OF THE

STATE OF ILLINOIS

APPELLATE TERM

OCTOBER TERM, A. D. 1940.

THE ZERO ELECTRIC CORPORATION, a corporation, PLAINTIFF-APPELLANT, v. R. H. WILSON, d/b/a ROCKET CITY ELECTRIC SUPPLY CO., DEFENDANT-APPELLEE.	APPEAL FROM THE CIRCUIT COURT OF WINNEBAGO COUNTY

Dove, J. delivered the opinion of the court:

Appellant, a Cleveland, Ohio, manufacturer of electrical appliances, sued appellee in the circuit court of Winnebago County to recover a balance of $217.62, alleged to be owing appellant for electrical appliances furnished appellee for installation at Camp Lillie, an army camp near Table Grove, Illinois. Appellee did business as Rocket City Electric Supply Co., and also as Wilson Electric Company, and had a contract with the United States Government for furnishing and installing certain electric lighting appliances, consisting principally of glass globe fixtures with porcelain sockets, metal flanges, and sheet metal reflectors, for outdoor use at the army camp. The appliances were shipped by appellant to Wilson Electric Company at Table Grove. Appellee filed an answer to the complaint, and a counterclaim, seeking judgment against appellant in the sum of $164.00. The cause was heard by the court without a jury, and a judgment for $73.05 and

costs of suit was entered against appellant in favor of appellee on the counterclaim, and appellant has appealed to this court from the judgment.

In arriving at the amount of the judgment, the trial court allowed appellee $81.48, being the difference between 50% and 52% discount, on the list price of certain items shown by appellant's catalogue. The discount of 52% on these items was quoted to appellee by Fred E. Chambers, the manufacturer's agent, in reply to appellee's letter to him of November 28, 1942, asking price and delivery. After receipt of three orders from appellee on that basis as to certain items, appellant wrote appellee under date of December 28, 1942, that the certain items ordered carried only a 50% discount from list, to which appellee replied on December 30, 1942 that if appellant did not wish to fill the order and two other orders mentioned in the letter, at a discount of 52%, appellant should consider the letter "as a cancellation of all unshipped items," and asked acknowledgment of cancellation of same.

By order No. 608, dated 11/19/1942, the items thereby ordered were to be shipped in four installments up to February 2, 1943 by order No. 723, dated December 1, 1942, 50% of the order was to be shipped at once and the remainder on January 2, 1943. Each of these orders, and one other, dated December 23, 1942, ante date appellee's above mentioned letter of December 30, 1942, which appellant claims was a cancellation and rescinding of the contract by appellee. By the terms of the letter it was not a cancellation by appellee of any part of the orders, but, in order to constitute a cancellation of the items involved, affirmative action by appellant, adhering to the 50%, was necessary, Appellant did not notify appellee of any such action by it, nor of the cancellation of any unshipped item. The abstract does not show any further communication on the subject between the

costs of suit was entered against appellant in favor of appellee on the counterclaim, and appellant has appealed to this court from the judgment.

In awarding as the amount of the judgment, the trial court allowed appellee $81.42, being the difference between 50% and 52% discount, on the list price of certain items shown by appellant's catalogue. The discount of 52% on these items was quoted to appellee by Fred E. Chambers, the manufacturer's agent, in reply to appellee's letter of date of December 28, 1942, asking price and delivery. After receipt of these orders from appellee on that basis as to certain items, appellant wrote appellee under date of December 28, 1942, that the certain items ordered carried only a 50% discount from list, to which appellee replied on December 30, 1942 that if appellant was not able to fill the order and the other orders mentioned in the letter, at a discount of 52%, appellant should consider the letter "as a cancellation of all mentioned items," and asked acknowledgment of cancellation of same.

By order No. 503, dated 11/12/1942, the items thereby ordered were to be shipped in four installments up to February 1, by order No. 523, dated December 1, 1942, 50% of the order was to be shipped at once and the remainder on January 2, 1943. Each of these orders, and one other, dated December 10, 1942, sent after appellee's above mentioned letter of December 30, 1942, which appellant claims was a cancellation and rescinding of the contract by appellee. By the terms of the letter it was not a cancellation by appellee of any part of the orders, but, in order to constitute a cancellation of the items involved, affirmative action by appellant, adhering to the 50%, was necessary. Appellant did not notify appellee of any such action by it, nor of the cancellation of any mentioned item. The abstract does not show any further communication on the subject between the

parties, but it appears that all the articles ordered were shipped by appellant to appellee. The abstract does not show the dates when the items were shipped, and appellant produced no testimony tending to show that they were shipped before the receipt of appellee's letter of December 30, 1942. Two of the orders name shipping dates subsequent to the alleged cancellation, the letters between the parties about that time indicate that there was a quantity of articles then unshipped, and in the absence of any showing to the contrary, the knowledge of which was particularly appellant's, the presumption is that there was a large amount of goods shipped to appellee after the time his letter of December 30, 1942, was received by appellant. A contract entered into by correspondence becomes complete when the latest proposition made by one party is assented to by the other. (Cottingham v. National Mutual Church Ins. Co., 290 Ill. 26, 32), and the shipping of goods pursuant to an order which specifies a price for the goods ordered is an acceptance of the terms of the order and becomes a contract between the parties. (Star Union Line v. Boston Medical Institute, 126 Ill. App. 106). The weight of the evidence shows that appellant accepted the orders of the items claimed by appellant at 52% discount, and the trial court correctly allowed the item of $81.48 as a credit by way of the counterclaim. What is here said also adversely disposes of appellant's claim that appellee's letter, last above mentioned, constituted a cancellation and rescission by appellee of the contract, depriving him of any right of recovery in this case.

Another item of the counterclaim allowed by the court is $250.00 for repairing 500 defective fixtures, requiring 125 hours of labor by electricians at $2.00 per hour. The description in the catalogue specifies "weatherproof porcelain socket with

parties, but it appears that all the articles ordered were shipped by appellant to appellee. The evidence has not been the dates when the items were ordered and appellant produced no testimony tending to show that they were shipped before the receipt of appellee's letter of December 30, 1942. Two of the orders have shipping dates subsequent to the alleged cancellation, the letters between the parties show that the invoices that there was a quantity of articles that unshipped, and in the absence of any showing to the contrary, the knowledge of which was particularly appellee's, the presumption is that there was a large amount of goods shipped to appellee after the letter of December 30, 1942, was received by appellant. A contract entered into by correspondence cannot be complete when the latest proposition made by one party is assented to by the other. (Gottlieb v. National Bond Thrift Co., 20 N.E. 2d, 1, and the shipping of goods pursuant to an order under specified a price for the goods ordered is an assent to the terms of the order and forms a contract between the parties. (Sear Union Line v. Boston Herald Traveler. 120 N.E. 2d, 1, Ohio. 1955). The weight of the evidence shows that appellant accepted the orders of the items claimed by appellee to be in default, and the trial court correctly allowed the item of $81.40 as a credit by way of the counterclaim. When the items were also correctly disposed of appellant's claim that appellee's letter, last above mentioned, constituted a cancellation and rescission by appellee of the contract, deprived him of any right of recovery in this case.

Another item of the counterclaim allowed by the court is $450.00 for repairing 300 defective fixtures, requiring 125 hours of labor by electricians at $3.00 per hour. The description in the catalogue specified "weatherproof porcelain socket with

shade holder groove and flange." The testimony shows that there was no shade holder groove on the procelain portion of the goose neck and the next day the reflector slipped back to the building. Tape was added, and threads on some of the clamps furnished by appellant, designed to correct the defects, stripped and would not hold. The two other items allowed the counterclaimant are $164.00 for repainting 300 goose neck fixtures which rusted, and $100.00 for reboring the center hole in about 150 flanges which keep the goose neck from turning, requiring 50 hours labor at $2.00 per hour. The holes were too small to admit the goose neck. Subsequently appellant sent a number of substitute flanges. The testimony shows that $2.00 per hour was the customary charge for electrical work at Table Grove.

Some of the articles shipped were returned to appellant as damaged. The trial court allowed appellee a credit in the amount which appellant claimed appellee was entitled to on this account, and there is no issue in this court as to those particular items. Appellant's contention that the trial court refused to give weight to appellee's letter of June 22, 1943, is of no consequence. The letter related to the returned items concerning which appellant received all that it asked.

Appellant's claim that the articles were sold under a trade name of "Government Type" and that because thereof there was no warranty of their fitness, and no liability of appellant on account of the defects, is untenable. There is no semblance of a trade name in the words "Government Type." Appellant's president testified that appellant represented the material was suitable for outside use, that they knew it was to be used for army installation, and that it must conform to U. S. army requirements. The words "Government Type" used in the catalogue amount to a warranty that the goods illustrated conform to those

[illegible]

requirements, but the words do not in any sense constitute a trade name, and there is no testimony that they were so intended. It was held in American Spiral Pipe Works v. Universal Oil Products Co., 220 Ill. App. 383, 390, that where a manufacturer contracts to supply an article for a particular purpose, there is an implied warranty that the article shall be reasonably fit for such purpose. Santa Rosa Vallejo-Tanning Co. v. C. Kronauer & Co., 228 Ill. App. 236, and Beckett v. F. W. Woolworth Co., 376 Ill. 470, where the articles were sold under a trade name, are not applicable here. The trial court held that by the use of the words "Government Type" there was an implied warranty by appellant that the articles conformed to government requirements and we think that holding is correct.

By section 69 of the Sales act (Rev. Stat. 1945, chap. 121½, par. 69), it is provided:

"(1) Where there is a breach of warranty by the seller, the buyer may, at his election -

(a) Accept or keep the goods and set up against the seller, the breach of warranty by way of recoupment in diminuation or extinction of the price.

(b) Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty." (Guardian Electric Mfg. Co. v. National Mineral Co., 319 Ill. App. 642; Anderson Computing Scale Co., v. Hattenbach, 199 id. 467; Dravo Doyle Co. v. Sulzberger & Sons Co., 197 id. 547; Krone Die Casting Co. v. Do-Ray Lamp Co., 297 id. 602).

Appellant's claim that an acceptance of goods bars any claim for breach of warranty, citing American Theatre Co. v. Siegel, Cooper & Co., 221 Ill. 145, 148, has no merit in the case at bar. In the case cited the goods were opera chairs sold

requirements, but the words do not in any sense constitute a trade name, and there is no testimony that they were so intended. It was held in American Spiral Pipe Works v. Universal Oil Products Co., 290 Ill. App. 303, 310, that where a manufacturer contracts to supply an article for a particular purpose, there is an implied warranty that the article shall be reasonably fit for such purpose. Santa Rosa Valle-Training Co. v. L. Kronquer & Co., 228 Ill. App. 469, and Wagner v. F. W. Woolworth Co., 276 Ill. 470, where the articles were sold under a trade name, are not applicable here. The trial court had said by the use of the words "Government Type" there was an implied warranty by appellant that the articles conformed to government requirements and we think that holding is correct.

Section 35 of the Uniform Act (Ill. Ann. Stat. Chap. 121½, par. 60), it is provided:

"(1) Where there is a breach or warranty by the seller, the buyer may, at his election -

(a) Reject or keep the goods and set up against the seller, the breach of warranty by way of recoupment in diminution or extinction of the price.

(b) Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty." (Guardian Electric Mfg. Co. v. National Manufg. Co., 329 Ill. App. 646; Anderson Dumpcrete Corp. Co., v. Rothschild, 320 Ill. 427; Bravo Dyeing Co. v. Schlaybaugh & Co., 327 Ill. 347; Krone Die Casting Co. v. Jay-Jay Lamp Co., 327 Ill. 600).

Appellant's claim that an acceptance of goods bars any claim for breach of warranty, citing Lawrence Brooks Co. v. Stoppel, Cooper & Co., 221 Ill. 147, 149, has no merit in the case at bar. In the case cited the goods were opera glasses sold

by sample, and it appears that they substantially conformed to the sample and were kept, set up, and used by appellee, and there was no claim of any defect therein, nor any basis for any claim for damages. That case is not applicable here.

The record shows that appellee gave appellant written notice of the defects in the appliances within a reasonable time after appellee knew or ought to have known thereof. Instead of exonerating appellant from damages for a lack of such notice of the breach of the warranty, the proofs show that appellee gave such notice and is entitled to the entire amount for the several items allowed by the court, under the express terms of section 69 of the Sales act, supra.

The judgment of the trial court is correct and is affirmed.

Judgment affirmed.

by sample, and it appears that they substantially conformed to the sample and were sold, and used by consumers, and there was no claim of any defect thereto, nor any basis for any claim for damages. This case is not materially here.

The second issue that appellee gave sufficient written notice of the defects in the appliances which a reasonable time after appellee knew or ought to have known thereof. The fact of exonerating appellant from liability for a breach of the action of the breach of the warranty, the proofs show that appellee gave such notice and is entitled to the saving clause for the several items allowed by the court, under the proviso (Sec. 2) section 59 of the Uniform Act, supra.

The judgment of the trial court is reversed and is affirmed.

Judgment affirmed.

RESERVE BOOK

ILL. APP. UNPUB.OPIN.

VOL. 330

77990

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DATE	NAME		
8/31	D. Daffe	372-6616	
11/29	J. Bowles	782-1869	
	J. Hengeoll	236-8555	
1/10/78	Lucente		
2/8/78	P. Maus	782-5949	
5/27/79	Toler	9221208	
12/17/79	J. Boyle	222-0800	
	V. Olafson	222-9350	
	F. Petrilli		
6/13	J.W. GALLAGHER	372-3100	

77990